A

TREATISE

ON THE

LAW OF EVIDENCE.

By S. M. PHILLIPPS, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

SECOND EDITION,

WITH CONSIDERABLE ADDITIONS.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. BUTTERWORTH AND SON, LAW-BOOKSELLERS, FLEET-STREET;

AND J. COOK, ORMOND-QUAY, DUBLIN.

1815.

ADVERTISEMENT.

SEVERAL Additions and Alterations have been made in the present Edition of the following Treatise. Some Parts of the Work, which appeared to be treated in too concise a manner, have been enlarged, and the whole has been carefully revised. In consequence of the length of Time, which the former Edition took in passing through the Press, many Cases had been reported before its publication, which it was not possible to introduce; these, and the other Cases upon the subject down to the present period, are now inserted.

MIDDLE TEMPLE,
May 19. 1815.

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A

TREATISE

ON THE

LAW OF EVIDENCE.

PART THE FIRST.

THE arrangement, which has been adopted in the following Treatise, is that which appeared the most simple and perspicuous. The work consists of two parts; the former, relating to parol or unwritten evidence; the latter, to written evidence. The subject of the first chapter is the method of compelling the attendance of witnesses for the purpose of being examined; and the five succeeding chapters treat of the causes, which render witnesses incompetent. In these, the writer has inquired into the several objections to witnesses, arising from want of reason or understanding, from defect of religious principle, from conviction of certain crimes or from infamy of character, from interest, and lastly that arising from the relation which subsists between a client and his counsel or his solicitor. After ascertaining whether the witness is competent to give evidence, the next question, that arises, is, what evidence ought to be given, and how the witness ought to be examined. The seventh chapter, therefore, treats of the general nature of proofs; and the eighth, of the regular mode of examining a witness. And the first Plan of the work.

B part

part then concludes with an inquiry into bills of exception and demurrers to evidence.

The second part, which relates to written evidence, treats of records, of the admissibility of verdicts, and judgments, and other judicial proceedings, and of the manner in which they are to be regularly proved. Public writings, not of a judicial nature, and the inspection of such writings, are next considered; after which, follows an inquiry into the proof of private writings, the requisite of stamps on written instruments; and, lastly, into the admissibility of parol evidence by which written instruments may be explained or varied.

CHAP. I.

On the Attendance of Witnesses.

Attendance in civil cases.

THE process, which courts of law have instituted for the purpose of compelling the attendance of witnesses, is by the writ of subpœna ad testificandum. This writ commands the witness to appear at the trial to testify what he knows in the cause, under the penalty of 100l. to be forfeited to the king. And the stat. 5 Eliz. c. 9. s. 12. gives an additional remedy by enacting, that, "if any person (upon whom any process out of a court of record shall be served, to testify concerning any cause or matter depending there, and having tendered to him according to his countenance or calling such reasonable sum of money for his costs and charges, as with regard to the distance of the place is necessary to be allowed,) do not appear according to the tenor of the process, not having a lawful and reasonable cause to the contrary; he shall forfeit for every such offence 10l., and yield such further recompence to the party grieved, as by the discretion of the judge of the court, out of which the process issues, shall be awarded."

No

No witness is bound to appear in civil cases, unless his reasonable expences, for going to and returning from the trial, be tendered him at the time of serving the subpœna; nor, if he appears, is he bound to give evidence, till such charges are actually paid or tendered (1), except he reside within the bills of mortality, and be summoned to give evidence within them (2). The necessity of this previous tender arises from the special provision in the act of Elizabeth before cited.

If a necessary witness is brought over from a foreign country after the commencement of an action, and gives evidence at the trial, the reasonable expences of his passage over, and of his subsistence here pending the action, will be allowed on the taxation of costs. This point was determined by the Court of Common Pleas in the case of Cotton v. Witt (3); in which case, it may be proper to observe, an application had been made to the opposite party for his consent to the examination of the witness on interrogatories, which had been refused. In the taxation of costs in that case, the expences of the witness's return to his own country after the trial were not allowed. According to the report, little notice appears to have been taken of that point; and no reason seems to have been stated for making the distinction. The allowance of expences in the case of foreign witnesses is from analogy to the common case of witnesses resident in this country; and there, on the taxation of costs, the expences are allowed for the witness's return to his place of residence, as well as for his journey to the place of trial. And it should seem, from the reported opinion of the present Chief Justice of the Court of Common Pleas in the later case of Sturdy v. Andrews (4), that, when a witness is brought over from a foreign country *after* the commencement of an action, the expences both of his

(1) Chapman v. Poynton, 2 Stra. 1150. 13 East, 16. n. *a*. S. C. more fully stated. Bowles v. Johnson, 1 Blac. Rep. 36. Fuller v. Prentice, 1 H. Blac. 49.

(2) 3 Blac. Com. 369. Tidd. Prac. 805.

(3) 4 Taunt. 55.

(4) 4 Taunt. 699.

coming to this country and of his return ought to be allowed in the taxation of costs. But such costs will not be allowed, if the witness has been brought over from abroad *previous* to the commencement of the action (1), or if the witness, being in the country, was detained here for the purposes of the trial (2); in those cases, the court will only allow the expences for the witness's subsistence here during the action.

As only four witnesses can be included in one writ of subpœna (3), several writs are frequently necessary. In order to save expence, it is settled, that leaving a ticket, containing the substance of the writ, will be as effectual as the writ itself; but the writ ought to be shewn (4). The writ or ticket should be served personally on the witness (5), and in reasonable time before the day of trial, that he may suffer the less inconvenience from his attendance on the court (6). Notice to a witness in London, at two in the afternoon, requiring him to attend the sittings at Westminster in the course of the same evening, has been held to be too short (7). If the witness, whose attendance is required, be a married woman, it will be necessary to serve the subpœna upon her personally, and the tender of the expences should be made to her and not to her husband (8). If a cause appointed for one sitting be made a *remanet*, the subpœna must be re-sealed and re-served. (9)

If a witness, who has been duly served with the writ, and has had a tender of the reasonable expences, omits to attend at the trial without a sufficient cause, he is liable to be proceeded against in one of three ways: 1. By attachment,

(1) Schimmel v. Lousada, 4 Taunt. 695.

(2) Sturdy v. Andrews, 4 Taunt. 697.

(3) Cowp. 846.

(4) Goodwin v. West, Cro. Car. 522. 540. Maddison v. Shere, 5 Mod. 355. S. P.

(5) Smalt v Whitmill, 2 Stra. 1054. Wakefield's case, Rep. temp. Hard. 313. S. P.

(6) Hammond v. Stewart, 1 Stra. 509.

(7) 2 Tidd. Pr. 807., 5th edit.

(8) Cro. El. 122. 1 Jon. 430. S P.

(9) Sydenham v. Rand, 24 G. 3. K. B. cited from MS. in 2 Tidd. Pr. 806.

for

for a contempt of the process of the court (1); 2. By a special action on the case for damages, at common law (2) 3. By an action on the stat. 5 Eliz. c. 9. s. 12. for the penalty of 10l., and also for the further recompence recoverable under that statute. This action for a further recompence will not lie, unless the amount has been previously assessed by the court out of which the process issued: neither the jury nor the judge at nisi prius being competent to make the assessment (3). When the assessment has been made, an action of debt will lie. But the more usual way is to proceed by attachment. And in order to ground this summary way of proceeding, it is not only necessary to shew an ill motive in the witness, or negligence and inattention to the process of the court, but also to prove that the witness was personally served (4), and that his reasonable expences were paid or tendered at the time of the service of the subpœna. (5)

It has been laid down, that it is not the practice of the Court of Common Pleas to grant an attachment against a witness for non-attendance, but that they leave the party injured to his remedy at law (6). However several cases (7), in which the court has refused an attachment under special circumstances, seem to shew that the general rule is the same in the Common Pleas as in the Court of King's Bench.

The witnesses, as well as the parties in a suit, are protected by courts of justice, and privileged from arrest, *eundo morando et redeundo* (8). And in ordinary cases it is not necessary for the protection of a witness, that he should have been served with a subpœna, if upon application to him he

(1) 1 Stra. 510. 2 Stra. 810. 1054. 1150. Cowp. 846. Doug. 561.
(2) Pearson v. Iles, Doug. 561.
(3) Ib. See, ante, p. 2.
(4) 2 Stra. 1054.
(5) Ante, p. 2.
(6) Per Wright, J. in Ryder v. Fletcher, cited 13 East. 16. Huffe v. Fowke, Barnes, 33.
(7) Brodie v. Tichel, Barn. 35. Stretch v. Wheeler, do. 497. Fuller v. Prentice, 1 H. Bl. 49. Blandford v. Detastet, 5 Taunt. 260.
(8) Lightfoot v. Cameron, 2 Blac. Rep. 1113.

consented to attend without one (1). A reasonable time is allowed to the witness for going and returning; and, in making the allowance, the courts are disposed to be liberal (2). This privilege has been extended to a party in the suit attending an arbitrator under an order of nisi prius (3). And so a bankrupt, attending a meeting of commissioners in pursuance of a notice, is during his attendance protected from arrest at the suit of a creditor (4), the commissioners being assembled under the authority of an act of parliament, and sitting as a court for the administration of justice.

Commissioners of bankrupt, by stat. 1 J.1. c. 15. s.10. are empowered to issue their warrant and apprehend persons, who, after a sufficient warning given to them, refuse to come and appear before them to be examined, not having any lawful impediment for such refusal. And by section 11. of the same act, witnesses sent for by the commissioners shall have such costs and charges, as the commissioners shall think fit. It has been determined, that it is not necessary, under this section, to tender a witness, at the time of summoning him, the expences of his journey; although, if he be in fact without the means of taking the journey, it may be an excuse for not obeying the summons (5). The necessity of a previous tender of expences, in the case of a witness who is subpœnaed to attend at a trial, arises from the special provision of the stat. 5 Eliz. c. 9. s.12.

By the stat. 5 G. 2. c.30. s. 6. it is enacted, that, in case a bankrupt is in execution or cannot be brought before the commissioners, the acting commissioners shall attend the bankrupt and take his discovery: but as this attendance on

(1) Ld. Kenyon C. J. in Arding v. Flower, 8 T. R. 536.

(2) 2 Blac. Rep. 1113. Hatch v. Blisset, Gilb. Cas. 308, cited 2 Stra. 986. 13 East, 16. n. (a).

(3) Spence v. Stuart, 3 East, 89.

(4) Arding v. Flower, 8 T. R. 534. 2 Blac. Rep. 1142. Kinder v. Williams, 4 T. R. 377. Spence v. Stuart, 3 East, 89. Ex parte Byne, 1 Ves. & Beam. 316.

(5) Battye v. Gresley, 8 East, 319.

the bankrupt in prison has been found to be extremely inconvenient, it is now provided by stat. 49 G. 3. c. 121. s. 13. that bankrupts charged in execution are to be brought before the commissioners to be examined by them, in the same manner as bankrupts in custody on mesne process: and the warrant of the commissioners is an indemnity to the keeper of the prison.

The general inclosure act, stat. 41 G. 3. c. 109. s. 33, 34. gives commissioners a power to summon in writing any person within a certain distance to appear before them and to be examined, and subjects them to a penalty, in case they refuse to appear.

The means of compelling the attendance of witnesses, in criminal cases, are of two kinds (1): first, By process of subpœna; or, secondly, the justice or coroner, who takes the information of the witnesses, may, at the time of taking it, or at any time before the trial, bind them over to appear, and, if they refuse to come or to be bound over, may commit them for a contempt: and this is the ordinary and more effectual method. **Attendance in criminal cases.**

In prosecutions for misdemeanors the defendant has been from the earliest times allowed the writ of subpœna: but prisoners had no right, by the common law, to this process in capital cases (2), without the special order of the court. Formerly a prisoner was put upon his trial under a twofold disadvantage; he was unable to compel the attendance of witnesses, and, if they voluntarily attended, their evidence, not being given on oath, met with less credit than the evidence on the part of the prosecution. But by stat. 7 W. 3. c. 3. s. 7., all persons indicted for any high treason, whereby corruption of blood may ensue, shall have the like process of the court, where they shall be tried, to compel their witnesses to appear for them, as is usually granted to com-

(1) 2 Hale P. C. 281. (2) 2 Hawk. P. C. 46. s. 17.

pel witnesses to appear against them. And now, as the stat. 1 Ann. st. 1. c. 9. s. 3. enacts, that all witnesses on behalf of a prisoner, on a trial for treason or felony, shall be sworn in the same manner as witnesses for the crown, and be liable to all the penalties of perjury, process may be taken out against them in any case whatever. (1)

In order to provide for the appearance of witnesses, to answer in cases where warrants are not usually issued, and to give evidence in criminal prosecutions in any part of the United Kingdom, it is enacted by a late act of parliament, stat. 45 G. 3. c. 92. s. 3., that the service of a writ of subpœna or other process in any part of the United Kingdom shall be as effectual to compel his appearance in any other part, as if the same had been served in that part where the person is required to appear. And if the person served does not appear, the court, out of which the process issued, may transmit a certificate of the default in the manner specified by the act, and the court to which the certificate is transmitted may punish the person for his default, as if he had refused to appear to process issuing out of that court.

Compensation.

In civil proceedings, as we have seen, a witness is not obliged to attend, unless his expences are duly tendered; but, in criminal prosecutions, the demands of public justice supersede every consideration of private inconvenience, and witnesses are unconditionally bound to appear. On the other hand, it is reasonable and highly expedient, that, when they attend on behalf of the public, a fair compensation should be given them for their trouble and necessary expence. Formerly, however, the law provided no means for reimbursing them; a defect in our judicial administration, which was at length remedied by stat. 27 G. 2. c. 3. s. 3. This statute enacts that "when any poor person shall appear on recognizance to give evidence against another accused of grand or petit larceny or other felony,

(1) 2 Hawk. P. C. c. 46. s. 17.

the court may on the oath of such person, and on consideration of his circumstances, in open court order the treasurer of the county or place, in which the offence shall have been committed, to pay such sum of money, as to the court shall seem reasonable, for his time, trouble, and expence." As this statute extended only to poor persons who appeared on recognizance, and not to such as appeared on subpœna to give evidence, it was afterwards deemed reasonable by the legislature, that every person so appearing on recognizance or subpœna should be allowed his reasonable expences, and also, in case of poverty, a satisfaction for his trouble and loss of time. The stat. 18 G. 3. c. 19. s. 8. therefore enacts that "where any person shall appear on recognizance or subpœna to give evidence as to any grand or petit larceny or other felony, whether any bill or indictment be preferred or not to the grand jury, it shall be in the power of the court (provided the person shall, in the opinion of the court, have *bonâ fide* attended in obedience to such recognizance or subpœna,) to order the treasurer of the county or division, in which the offence shall have been committed, to pay him such sum as to the court shall seem reasonable, not exceeding the expences which it shall appear to the court the said person was *bonâ fide* put unto, by reason of the said recognizance and subpœna, making a reasonable allowance, in case he shall appear to be in poor circumstances, for trouble and loss of time."

Witness on ship-board or in custody.

In some cases a subpœna can have no effect, as where the witness is in custody, or on board a ship under the command of an officer, who refuses to allow his attendance. The course then is to sue out a writ of habeas corpus ad testificandum; for which purpose application ought to be made to the court or judge, upon affidavit of the party applying, stating that he is a material witness (1); and, in case of his being on board a ship, that he is willing to attend (2). Upon this application the court in its discre-

(1) Layer's case, Fortesc. 396. (2) Roddam's case, Cowp. 672.

tion

tion will make a rule, or the judge will grant his fiat for a writ (1), which is then sued out, signed, and sealed (2). The writ should be left with the sheriff or other officer, who will then be bound to bring up the body, on being paid his reasonable charges. If the witness be a prisoner of war, he may be examined by consent on interrogatories, but cannot be brought up without an order from the secretary of state. (3)

It has been doubted whether persons in custody could be brought up as witnesses by writ of habeas corpus to give evidence before any other courts except those at Westminster: but now by stat. 43 G. 3. c. 140. it is enacted, that a judge of either of the courts may, at his discretion, award such writ for bringing a prisoner, detained in any goal in England, before a court martial, or before commissioners of bankrupt, commissioners for auditing the public accounts, or other commissioners acting by virtue of any royal commission or warrant.

Witness abroad.

When a material witness resides abroad, or is going abroad, and cannot attend at the trial, the party requiring his testimony may move the court in term time, or may apply to a judge in vacation for a rule or order to have him examined on interrogatories *de bene esse* before one of the judges of the court, if the witness reside in town, or, if he reside in the country or abroad, before commissioners specially appointed and approved by the opposite party (4). The rule or order for such examination, which is only secondary evidence, cannot be obtained without the consent of both parties. And, though the court cannot compel the other party to consent, yet, if necessary, it will assist the party applying by putting off the trial, (that there may be an opportunity of filing a bill in equity,) until the consent is obtained, or the witness returns: and if, after all, the

(1) Burbage's case, 3 Burr. 1440.
(2) Tidd. Pr. 739.
(3) Furly v. Newnham, 2 Doug. 419.
(4) 2 Tidd. Pr. 812.

defendant

defendant should refuse, the court will not give him judgment as in case of a nonsuit. (1)

When a party, after obtaining leave by consent, examines witnesses abroad on depositions, he will not be entitled to any allowance in the taxation of costs for the expence of taking the depositions, although he may proceed in the action (2). The same rule prevails in the court of chancery: if a party applies to that court for a commission to examine witnesses, he must pay the expences.

Before the court will consent to put off the trial on account of the absence of a material witness, it requires to be satisfied, that injustice would be done by refusing the application, and that the party who makes the application has not conducted himself unfairly, nor been the cause of any improper delay (3). The rule will not be granted where the testimony of the witness is intended to set up an odious defence, (as, that the plaintiff is slave to the defendant, and therefore could not recover in the action, or that he is an alien enemy (4), &c.): nor will it grant the rule for the purpose of giving the defendant an opportunity, which he has once lost by his own neglect, of applying to a court of equity for a commission. (5)

Where a cause of action has arisen in India, or any offence has been committed there, which is tried in this country, the evidence of witnesses resident in India may be obtained in the manner prescribed by stat. 13 G. 3. c. 63. s. 40. and s. 44.

If a witness has in his possession any deeds or writings, which are thought necessary at the trial, a special clause Subpœna ducestecum.

(1) Furly v. Newnham, 2 Doug. 419. Mostyn v. Fabrigas, Cowp. 174. Calliard v. Vaughan, 1 Bos. & Pull 211.

(2) Stephens v. Crichton, 2 East, 259. Taylor v. Roy. Ex. Ass. Comp, 8 East, 393.

(3) Saunders v. Pitman, 1 Bos. & Pull 33.

(4) Robinson v. Smyth, 1 Bos. & Pull. 454.

(5) Calliard v. Vaughan, 1 Bos. & Pull. 212.

must

must be inserted in the subpœna, called a *duces tecum*, commanding him to bring them with him. When the writings are in possession of the adverse party or his attorney, notice should be given to produce them, and if after proof of a reasonable notice they are refused, secondary evidence of the contents will be admitted. It is not necessary to give notice to the defendant himself: giving it to his attorney will be sufficient, even in penal actions. (1)

This writ of subpœna *duces tecum*, as well as the other writ of subpœna *ad testificandum*, is compulsory upon the witness. And though it will be a question for the consideration of the judge at the trial, whether in any particular case the actual production of writings should be enforced, yet the witness ought always to have them ready to be produced, if required, in obedience to the judicial mandate (2). From the earliest times, our courts of common law, in order to give effect to their proceedings, have resorted to these compulsory measures for the production of evidence, measures obviously essential to the existence and constitution of courts of justice.

(1) Attorney-General v. Le Merchant, 2 T. R. 203. n. Cates q. t. v. Winter, 3 T. R. 306.

(2) Amey v. Long, 9 East, 485.

CHAP. II.

Of the Incompetency of Witnesses from Want of Understanding.

WHEN a witness appears, he must be regularly sworn, unless an objection is made to his competency. An exception to the *credibility* of a witness cannot exclude him from being sworn. The exception of kindred, for example, although it is a good cause of challenge against a juror, is not an objection to the competency of a witness; a father is a competent witness for or against his son, and a master for his servant, or the servant for his master. Such exceptions may affect the credibility, but they do not affect the competency of witnesses.

As it is the province of the jury to consider what degree of credit ought to be given to evidence, so it is for the court alone to determine whether a witness is competent, or the evidence admissible. Whether there is *any* evidence, is a question for the judge: whether it is *sufficient*, is for the jury (1). And whatever antecedent facts are necessary to be ascertained, for the purpose of deciding the question of competency, as, for example, whether a child understands the nature of an oath — or, whether the confession of a prisoner was voluntary — or, whether declarations, offered in evidence as dying declarations, were made under the immediate apprehension of death — these, and other facts of the same kind, are to be determined by the court, and not by the jury.

By the law of England the objections to the competency of witnesses are fourfold. The first ground of incompetency is want of reason or understanding: a second

(1) Per Buller J., Comp. of Carpenters, &c. v. Hayward, Doug. 375. Bull. N. P. 297.

ground

ground is defect of religious principle: a third ground arises from conviction of certain crimes, or from infamy of character: the fourth and most general cause of incompetency is interest. Either of these grounds of incompetency will exclude the witness from giving any kind of evidence. "I find no rule less comprehensive than this," said Mr. Justice Lawrence, in the case of Jordaine v. Lashbrooke (1), "that all persons are admissible witnesses, who have the use of their reason, and such religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and who are not influenced by interest."

An inquiry into these several causes of incompetency forms the subject of the four following chapters.

First, as to incompetency for want of understanding;

Persons, who have not the use of reason, are from their infirmity utterly incapable of giving evidence: as persons insane, idiots, and lunatics under the influence of their malady (2). But lunatics and other persons, who are subject to temporary fits of insanity, may be witnesses in their lucid intervals, if they have sufficiently recovered their understandings (3). And a person born deaf and dumb is not on that account incompetent, but, if he has sufficient understanding, may give evidence by signs with the assistance of an interpreter. (4)

Children. A witness must not only have a competent share of reason, but also know the nature of an oath: children, therefore, who are not able to understand its moral obligation, cannot be examined (5). There seems to be no precise age fixed, at which infants are excluded from being

(1) 7 T. R. 610.
(2) Co. Lit. 6. *b*. 6 Com. Dig. tit. "Testmoigne," A. 1.
(3) Com. Dig. Ib.
(4) Ruston's case, 1 Leach, Cr. C. 455.
(5) Com. Dig. Ib. Bull. N. P. 293. Gilb. Ev. 130.

wit-

witnesses. At one time, indeed, their age was considered as the criterion of their competency; and it was a general rule, that none could be admitted under the age of nine years, very few under ten (1); which was in some measure denying them the protection of law against secret acts of violence (2). A more reasonable rule has been since adopted; and the admissibility of children is now regulated not by their age, but by their apparent sense and understanding. In Brazier's case, on an indictment for assaulting an infant of five years of age with intent to ravish her, it was agreed by all the judges, that children of any age might be examined on oath, if capable of distinguishing between good and evil: but that they cannot be examined, in any case, without oath (3). This is now the established rule in all cases, criminal as well as civil, and whether the prisoner is tried for a capital offence, or for one of an inferior nature. When the child has appeared not sufficiently to understand the nature and obligation of an oath, judges have often thought it necessary, for the purposes of justice, to put off the trial of the prisoner, directing that the child, in the mean time, should be properly instructed.

If a child is too young to be sworn, it follows as a necessary consequence, that any account, which it may have given others, ought not to be admitted. On an indictment, therefore, for a rape on a child five years old, where the child was not examined, but an account of what she had told her mother about three weeks after the transaction, was given in evidence by the mother, and the jury convicted the prisoner, principally, as was supposed, on that evidence: the judges, on a case reserved for their opinion, thought the evidence clearly inadmissible, and the prisoner was accordingly pardoned. (4)

(1) R. v. Travers, 2 Stra. 700.; and cases in East. P. C. 442. S. P. 1 Hal. P. C. 302. 2 Hal. P. C. 278.

(2) Bull. N. P. 293.

(3) Brazier's case, 1779, 1 East, P. C. 443, 4. Bull. N. P. 293. 1 Leach, Cr. C. 237. 4 Blac. Com. 214.

(4) R. v. Tucker, 1808, MS. See also R. v. Brazier, supra.

When

When the evidence of children is admitted, says Mr. Justice Blackstone (1), it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. It seems, however, impossible to lay down any general rule on this subject, applicable to all cases. A prisoner may be legally convicted on such evidence, alone, and unsupported; and whether the account of the witness requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the child has given his evidence. The evidence may be so circumstantial, so plain and clear, and so free from all mixture of partiality and ill will, as to leave no reasonable doubt of the prisoner's guilt, although it stands unsupported by other witnesses.

(1) 4 Com. 214.

CHAP. III.

Of Incompetency from Defect of Religious Principle.

THE second ground of incompetency, which has been mentioned, is defect of religious principle.

All witnesses, before they are examined, are required to take an oath, by which they appeal to the Supreme Being for the truth of the evidence which they are about to give. This necessarily implies a belief, that, by the laws of God, truth is enjoined, and falsehood punished. It is not sufficient, that a witness believes himself bound to speak truth from a regard to character or the common interests of society,

ciety, or from fear of punishment (1). Such motives have indeed their influence, and may come in aid of the religious obligation, but they are of a nature so capricious and infirm, and so liable to be perverted, as to afford little or no security for the observance of truth. Our law therefore, like that of most other civilized countries, requires a witness to believe, that there is a God and a future state of reward and punishment, and that by taking the oath he imprecates the divine vengeance upon himself, if his evidence shall be false. (2)

Atheists, and such infidels as profess not any religion, that can bind their consciences to speak the truth, are excluded from being witnesses (3). Lord Coke indeed says generally, that an *infidel* cannot be a witness (4), in which denomination he intended to comprise Jews as well as Heathens (5): and Mr. Serjeant Hawkins thought it a sufficient objection to the competency of a witness, that he believed neither the Old nor the New Testament (6). Lord Hale however was of a different opinion, and strongly points out the unreasonableness of excluding indiscriminately all Heathens from giving evidence, as well as the inconsistency of compelling them to swear in a form, which they may possibly not consider binding. "It were a very hard case, he says, if a murder, committed here in presence only of a Turk or a Jew, should be dispunishable, because such an oath should not be taken, which the witness holds binding, and cannot swear otherwise, and possibly might think himself under no obligation, if sworn according to the usual style of the courts of England (7)." All doubts upon this subject, however, are now removed. In the case of Omichund and Barker, (which came before Lord Chancellor Hardwicke, assisted by Lee C. J., Willes C. J., and Parker C. B.),

Atheists, &c.

(1) Ruston's case, 1 Leach Cr. C. 455.

(2) White's case, Leach Cr. C. 482. 1 Atk. Rep. 19. 48.

(3) Bull. N. P. 292. 1 Atk. 40. 45. 48. Gilb. Ev. 129.

(4) Co. Lit. 6. b.

(5) 2 Inst. 506. 3 Inst. 165. 1 Atk. 43. Willes, 541.

(6) Hawk. P. C. b. 2. c. 46. s. 148.

(7) 2 Hale P. C. 279.

it was solemnly decided, that the depositions of witnesses professing the Gentoo religion, who had been sworn according to the ceremonies of their religion under a commission out of Chancery, ought to be admitted in evidence (1). And it may now be considered as an established rule, that infidels of any other country, who believe in a God, the avenger of falsehood, ought to be received here as witnesses: but infidels, who believe not that there is a God or a future state of rewards and punishments, cannot be admitted in any case (2). It follows, that, for the purpose of trying the competency of a witness, the proper question is, not as to his particular opinions, as, whether he believes in Jesus Christ, or in the gospels, but whether he believes in the existence of a God and a future state. For this reason, in a case before Mr. Justice Buller, where a witness, who had been sworn on the gospels, was asked, whether he believed in the gospels on which he had been sworn, the question was objected to, and overruled by the court (3). This question appears to have been put *after the swearing in chief*, though before the examination of the witness. If it had been asked before the witness was sworn, it seems that it would have been regular; for if he had not believed in the gospels, how could he have been sworn upon them? The administration of an oath in such a case would be merely nugatory; and evidence would be given without any religious sanction, on the bare assertion of a witness. If the law requires an oath, and a witness believes not in any form of religion, the consequence seems to be, that he cannot be sworn. (4)

Excommunication.

It has been frequently laid down, that persons excommunicated are not competent witnesses, because it is supposed, that those who have been excluded from the church

(1) Omichund and Barker, 1 Atk. 21. 1 Wils. 84. S. C. Willes 538. S. C.

(2) Willes 549. 1 Atk. 45. Fachina v. Sabine, Stra. 1104. Morgan's case, Leach Cr. C. 64.

(3) R. v. Taylor, Peake's N. P. C. 11.

(4) A Tract has been written on this subject by Mr. Baron Smith, one of the Barons of the Court of Exchequer in Ireland.

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are not under the influence of any religion. The authority, generally referred to in support of this rule, is a dictum of Lord Coke C.J. in the case of the Attorney General v. Griffith (1), concerning the oath of allegiance required of Popish recusants. He is there reported to have said, "by the stat. 3 J. c. 5. every recusant convict is to be excommunicated; and therefore on my circuit, I do not admit of them for witnesses between party and party, they being not competent witnesses." On the authority of this dictum, the rule has been commonly adopted by writers on the subject of evidence; although the reason, upon which it is supposed to have been founded, would in the present day be generally exploded. But now, by a late act of the legislature, this objection has been entirely removed. The stat. 53 G. 3. c. 127. §2, 3. enacts that no sentence of excommunication shall be pronounced by Ecclesiastical Courts in cases of contempt or disobedience to their order, and that persons excommunicated shall in no case incur any civil penalty or disability.

With regard to the ceremony or form of administering an oath, that form is obviously the best, which most clearly conveys the meaning of the oath, and most forcibly impresses its obligation. And since this is not an essential part of the oath, but entirely of human institution, and has varied in different times and countries, though the substance of the oath must be the same in all, it is obviously necessary to allow men to swear according to the peculiar ceremony of their religion, that is, in the manner which they consider most binding on their conscience. "Possibly, says Lord Hale, they may not think themselves under any obligation, if sworn according to the usual style in the courts of England (2)." Jews have therefore been sworn in our courts from the earliest times on the Pentateuch (3); and no distinction appears ever to have been taken between their swearing in a civil or in a criminal case. In an old case,

(1) 2 Bulstr. 155.
(2) 2 H. P. C. 279. 1 Atk. 42. 48. Cowp. 389.
(3) 1 Atk. 40. 42. Willes, 543.

where a witness refused to be sworn in the usual form, by laying his right hand on the book and kissing it afterwards, Glin C. J. ruled, that he might be sworn, by having the book laid open before him and holding up his right hand (1). "In my opinion, said the Chief Justice, he has taken as strong an oath as any other witness." So on the trial of some of the rebels at Carlisle in the year 1745, a witness being sworn in the same manner by holding up his hand, the point was referred to the judges for their opinion, and they all agreed in thinking the witness legally sworn (2). Mahometans may be sworn on the Koran (3); and Gentoos, and upon the same principle all persons, according to the ceremonies of their religion (4). Whatever be the form, the meaning of the oath is the same. It is calling upon God to witness what we say, and invoking his vengeance, if what we say be false.

There appears to be no good reason for not admitting the solemn affirmation of a Quaker in all cases, as well as the oath of a Jew or Gentoo, or any other person, who thinks himself really bound by the mode and form in which he attests. Before the revolution, Quakers, who refused to take a legal oath, were treated as obstinate offenders, and subject to penalties (5). But, these hardships have been since removed by the Toleration Act (6), which first allowed them to make a declaration of their fidelity to the state, instead of taking an oath of allegiance, and exempted them from all pains and penalties, on their making, if required, certain other declarations there prescribed. And now by subsequent Acts (7), their solemn affirmation in Courts of Justice is admitted to have the same effect as an oath taken in the usual form, excepting only, that on such affirmation

(1) Dutton v. Colt, 2 Sid. 6.

(2) Per Gold J. in Mildrone's case, 1 Leach Cr. C. 459. Mee v. Reed, Peake's N. P. C. 22, S. P.

(3) Morgan's case, 1 Leach Cr. C. 64. per Gold J. delivering the opinion of all the judges. Cowp. 390. Fachina v. Sabine, 2 Stra. 1104.

(4) Omichund and Barker, 1 Atk. 21.

(5) St. 13 C. 2. c. 1.

(6) St. 1 W. & M. c. 18. s. 13.

(7) St. 7 & 8 W. 3. c. 34. St. 8 G. 1. c. 6. St. 22 G. 2. c. 46. s. 36.

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they are not permitted to give evidence in *criminal* cases. This exception has been continued in the several succeeding acts of the legislature on this subject; but the propriety of such a distinction seems questionable; unless, indeed, it can be shewn, that evidence requires less sanction in civil cases than in criminal, or that Quakers in making their solemn affirmation do not consider themselves under a strict religious obligation to speak the truth.

The legislature, by not admitting the affirmation of Quakers in *criminal* cases, must be understood to mean causes *technically criminal.* They may be received in penal actions: as, in an action for debt on the statute against bribery in elections (1): so, on a motion for an attachment for non-performance of an award (2), or on a motion to quash an appointment of overseers (3); these proceedings being of a civil, not a criminal nature.

But in all cases, which are substantially of a criminal nature, the affirmation of a Quaker is inadmissible: as, in an appeal for murder (4), though it is in form a civil proceeding; so on a motion for an information for a misdemeanor (5), or on exhibiting articles of the peace (6), or on a motion for non-performance of an order of Court (7). Where the application to the court is *against* a Quaker, his affirmation may be received in his own defence, though the proceeding be of a criminal nature. (8)

It has been observed by Lord Mansfield (9), that Quakers are at present under some hardship, in not being able to call other Quakers as witnesses in their defence, on a charge of treason or felony; since in these cases, witnesses

(1) Atcheson v. Everett, Cowp 382.

( ) Taylor v. Scott, cited Cowp. 394. Powel v. Ward, cited Andr. 200.

(3) R. v. Turner, 2 Str. 1219.

(4) Castil v. Bainbridge, 2 Str. 856. owp. 392.

(5) R. v. Wych, 2 Str. 872. R. v. Gardner, 2 Burr. 1117.

(6) R. v. Green, 1 Str. 527.

(7) Skipp v. Harwood. Willes, 291. and see n. (b) ib. where the cases on this subject are collected.

(8) R. v. Shacklington, And. 201. n. R. v. Gardner, 2 Burr. 1117. Cowp. 383. 392.

(9) Cowp. 391.

on behalf of the prisoner are to be *sworn*, before they can give evidence, like witnesses for the crown (1); and no exception is made in the statute, in order to give a prisoner the benefit of a Quaker's testimony.

(1) St. 7 & 8 W. & M. c. 3. s. 1. St. 1 Ann. st. 2. c. 9. s. 3.

CHAP. IV.

Incompetency from Infamy of Character.

SECT. I.

Of the Offences, which incapacitate.

A Third cause of incompetency proceeds from the conviction of certain crimes, or from infamy of character.

What offences incapacitate.

There are many offences, which our law considers such blemishes on the moral character, as to incapacitate from giving evidence in courts of justice (1); as, treason, and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, attaint of false verdict, and other offences of the same kind, which necessarily imply falsehood (2). The whole class of offences which come under the denomination of *felony* (3), that is, all offences which occasion a forfeiture of lands or goods, will have the same effect in rendering a witness incompetent; though it is obvious, that crimes are not always punished by the legislature in proportion to their guilt, and there may be more depravity in frauds, which are not punishable, than in some kinds of felony. By the common law, a person convicted of petty larceny was not a competent witness, as the offence was felony no

(1) Gilb. Ev. 126. Bull. N. P. 291. Jones v. Mason, 2 Stra. 833. Walker v. Kearney, 2 Stra. 1148.

(2) Co. Litt. 6. *b*. Hawk. b. 2. c. 46. s. 101. Com. Dig Testmoigne, A. 5. 2 H. P. C. 277. Fortesc. Rep. 209.

(3) Co. Litt. 6 *b*. Com. Dig. *ubi sup.*

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less than grand larceny (1); but now by stat. 31 G. 3. c. 35. it is enacted, that no person shall be incompetent by reason of a conviction for petty larceny. Some other offences also make a witness incompetent after conviction; as, a conspiracy to accuse another of a crime (2), præmunire (2), barretry (3), or conviction for bribing a witness to absent himself and not give evidence (4). So, it should seem, a person, who has been convicted of winning by fraud or ill practice in certain games, would not be a competent witness since the stat 9 Ann. c. 14. s. 5. not only inflicts a penalty, but also enacts that he shall be deemed infamous; and one of the legal consequences of infamy is incompetency to give evidence in a court of justice (5). As convicts in such offences cannot be witnesses, they cannot make affidavits to support a charge *against* others, but, to exculpate or defend themselves, their affidavits have been allowed (6); and upon the same principle the affirmation of Quakers are admitted in their own defence on a criminal charge. Outlawry in a personal action is no ground of exception (7). But judgment of outlawry for treason or felony, appearing on record by the sheriff's return of the exigent (8), has the same effect as judgment after a verdict or confession: it follows, therefore, that such an outlaw cannot be a competent witness. (9)

Some kinds of *punishment* were formerly thought to be marks of infamy, and therefore witnesses were frequently rejected after standing in the pillory, or after branding; these being the usual punishments for the *crimen falsi* (10).

(1) 2 H. P. C. 277. Pendock v. Mackinder, Willes 667; where the authorities on this point are collected.

(2) 2 H. P. C. 277. Co. Lit. 6. *b.* Hawk. P. C. b. 1. c. 72. s. 9. Com. Dig. *ubi sup.* 4 Blac. Com. 103. 136.

(3) R. v. Ford, 2 Salk. 690. Bull. N. P. 292. See Com. Dig. tit. Testmoigne A. 5.

(4) Adjudged in Clancey's case, by 7 judges; Holt C. J. doubting at first. Fortesc. Rep. 208.

(5) Co. Lit. 6. *b.* Fortesc. 208.

(6) Davis and Carter's case, 2 Salk. 461. Charlesworth's case cited by the Court in Walker v. Kearney, 2 Str. 1148.

(7) Co. Lit. 6. *b.* Com. Dig. Testm. A. 5. Hawk. P. C. b. 1. c. 72. s. 107.

(8) 3 Inst. 212. Hawk. P. C. b. 2. c. 48. s. 22.

(9) Celier's case, Sir T. Raym. 369.

(10) 2 H. P. C. 277. Co. Lit. 66.

But the distinction is obvious, and now clearly settled; it is not the punishment, but the nature of the offence, that causes infamy (1). Thus, it is no objection against the competency of a witness, that he has been in the pillory for a libel on the government, or for a trespass, or a riot (2): he is not incompetent, unless he has suffered for the *crimen falsi*, as, for perjury, &c., in which case, it is the crime, not the punishment, that incapacitates. And, on the other hand, after judgment for the latter kind of offence, he is not competent, though the punishment may have been only a fine (3). It is not the punishment, but the crime, that affects the competency of a witness.

The rule most commonly laid down is, that a *conviction* makes the witness incompetent: but it is not to be understood, that conviction alone incapacitates; for, on a motion in arrest of judgment, it may possibly be quashed (4). The judgment, therefore, as well as the conviction, must be proved, and can only be proved by the record or by a copy of the record (5). Even an admission by the witness himself, of his being in prison under judgment for grand larceny (6), or, of his having been guilty of perjury (7) on another occasion, will not make him incompetent, however it may affect his credit.

Competency how restored.

A person convicted of felony being thus disabled from giving evidence, it remains to be considered by what means the disability may be removed. In ancient times, this was effected in many cases by a proceeding then in use, called purgation (8), by which all persons, entitled to the benefit

(1) Gilb. Ev. 127. Bull. N. P. 292. R. v. Davis, 5 Mod. 75. R. v. Ford, 2 Salk. 690. Pendock v. Mackinder, 2 Wils. 18. Willes, 666. S. C. Fortesc. 209.

(2) Chater v. Hawkins, 3 Lev. 426. Com. Dig. Testm. A. 5. Gilb. Ev. 127. Fortesc. Rep. 209.

(3) R. v. Ford, 2 Salk. 690. Bull. N. P. 292. Crosby's case, 10 St. Tr. 42 Appx.

(4) Lee v. Gansel, Cowp. 8. Gilb. Ev. 129. Com. Dig. tit. Testm. A. 5. Sutton v. Bishop, 4 Burr. 2283.

(5) Com. Dig. Ib. 8 East, 79.

(6) R. v. Castel Careinion, 8 East, 78.

(7) R. v. Teale, 11 East, 309.

(8) Treby C. J. in Lord Warwick's case, 5 St. Tr. 172. Heb. 288. Kelyng, 37.

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of clergy, were allowed to clear themselves before the ordinary, even after a conviction in the temporal courts. If on this canonical trial the party failed, which seldom happened, he was sentenced to remain in the ordinary's prison; and, on the other hand, upon his acquittal, he was pronounced innocent, absolved from infamy, and discharged from the punishment, incapacity, and discredit incident to the felony. Thus, formerly, allowance of the privilege of clergy, followed by purgation, would restore the competency of a witness. But it was afterwards found necessary to abolish this mode of trial by purgation; and therefore the st. 18 Eliz. c. 7. s. 3. enacted, that persons, admitted to the benefit of clergy, should no longer be delivered to the ordinary for purgation; but "after the clergy allowed and burning in the hand, should forthwith be enlarged and delivered out of prison." In the construction of this statute, the judges held, that, as the old mode of purgation was thus taken away, the burning in the hand should be considered, as having the same effect in clearing away the disabilities of conviction (1). "It was never the intent of the statute, said Lord Chief Justice Treby in Lord Warwick's case, merely to set at large and leave him a convict-felon; but when it said 'delivered,' it meant delivered free from all incident and further penalties, as if delivered upon purgation (2)." Hence the burning in the hand is considered in the nature of a statute-pardon. (3)

In cases where, instead of this burning in the hand, some other punishment has been substituted by act of parliament, (as transportation by st. 4 G. 1. c. 11., or a fine or whipping by st. 19 G. 3. c. 74. s. 3.) felons, within the benefit of clergy, are made competent after suffering such substituted punishment: these statutes expressly providing, that it shall operate as a pardon, and completely remove all incapacities. Peers

(1) Heston's case, cited in Foxley's case, 5 Rep. 110. Searle v. Williams, Hob. Rep. 292. Celier's case, Sir T. Raym. 369. Lord Castlemain's case, Ib. 380. Kelyng, 37.

(2) Ld. Warwick's case, 5 St. Tr. 172.

(3) Hob. 292. Bull. N. P. 292.

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of parliament (1), and all clergymen, are entitled to benefit of clergy, and are therefore competent witnesses, without burning in the hand, and consequently without any punishment in its stead.

It appears to be established by several cases, that proof of the record, whereby clergy is granted, without further proof of the burning in the hand, is not sufficient (2): for the words of the statute are, that he shall be "delivered after clergy allowed and burning in the hand." This, therefore, is necessary to be proved, except in those cases where the benefit of clergy may be allowed without branding, as to a clerk in holy orders or peer of parliament, or where the branding is excused by pardon, or changed for another punishment (as a fine), and then it must be shewn, that the witness has suffered such substituted punishment instead of the other (3). In Lord Warwick's case, above cited, one who had been convicted of manslaughter and allowed his clergy but not burnt in the hand (4), was called as witness for the prisoner; and, on an objection to his competency, the lords referred it to the judges present, who thought he was not a competent witness, as the statute had made the burning in the hand a condition precedent to the discharge.

As the privilege of clergy, at common law, extended only to capital felonies, and not to petty larcenies or misdemeanors, persons convicted of petty larceny could not be discharged under stat. 18 Eliz. c. 7. s. 3. which relates only to such as were allowed their clergy, nor were they included in stat. 19 G. 3. c. 74. s. 3. which gives a discretionary power to substitute a moderate fine or whipping for burning in the hand (5); so that convicts in petty larceny, though they had suffered the sentence of the law, were still incompetent to give evidence, while in many cases

(1) St. 1 Ed. 6. c. 12. s. 4.

(2) Searle v. Williams, Hob. 288. Armstrong and Lisle, Kel. 93. Ld. Warwick's case, 5 St. Tr. 166.

(3) Burridge's case, 3 P. Wms. 485. 490.

(4) This may now be changed to a moderate fine, by st. 19 G. 3. c. 74. s. 3.

(5) St. 4 & 5 H. 7. c. 13.

convicts

convicts in grand larceny were admissible. This inconsistency was removed by a statute of the present reign, which has been already mentioned. (1)

The most effectual mode of restoring the competency of a witness is, by a pardon under the great seal, or by act of parliament. Some indeed have thought that it can only remove the punishment, not the blemish of character (2). But it is now settled, that a pardon of treason or felony, even after conviction or attainder, not only takes off every part of the punishment, but also clears the party from the legal disabilities of infamy and all other consequences of his crime (3). A pardon, whether under the great seal, or by act of parliament, is said to make the witness a new creature, and gives him a new capacity: the crime, indeed, may still be objected against him, as affecting his credit, but cannot be urged against his competency as a witness. And a pardon, by which the king remits the punishment of burning in the hand, is admitted to have the same operation (4). It is indeed highly expedient that a pardon should be allowed to have this effect, and that a discretionary power should be vested in the crown to remove such legal incapacities: otherwise, a person, once convicted of felony, would be stigmatized for life, and treated as infamous in courts of law, though in the opinion of mankind his character for truth and honesty may have been completely retrieved. Pardon.

As in the greater offences, so in those below felony, as perjury at common law, &c., a pardon will restore competency,

(1) St. 31 G. 3. c. 35. and 36 G. 3. c. 29. Irish stat.

(2) Lord Coke in Brown v. Crashaw, 2 Bulst. 154. Dodderidge J. in Harris v. Whyte, Palm. 412. Latch. 81.; and other dicta cited in Hargrave Jurid. Arg. 2 vol. p. 263.

(3) Cuddington v. Wilkins, Hob. 67. 81. Rookwood's case. Rep. Temp. Holt, 685. 4 St. Tr. 682. Crosby's case, Lord Raym. 39. Lord Castlemain's case, T. Ray. 379. 2 H. P. C. 278. Hawk. P. C. b 2. c. 37. s. 48. Com. Dig. Testm. A. 5. Reilly's case, Leach Cr. C. 510.

(4) Rookwood's case, R. T. Holt, 685. Warwick's case, 5 St. Tr. 166. Hawk. P. C. b. 2. c. 37. s. 49.

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where the disability is a consequence of the judgment (1). But where the disability is declared by act of parliament to be part of the punishment, as in the case of a conviction for perjury or subornation of perjury on the stat. 5 Eliz. c. 9., the king's pardon will not make the witness competent (1). In this case the statute expressly provides, that he shall never be admitted to give evidence in courts of justice, until the judgment be reversed. If the pardon is conditional (2), the performance of the condition ought to be shewn; for on that depends all its efficacy. Thus, where the pardon is on condition of transportation for a number of years, the witness is not competent before the expiration of the term or other lawful determination (3). To prove that a witness, after conviction, has been restored to his competency by pardon, it is necessary to produce the pardon itself under the great seal. A warrant under the privy seal or sign manual, is not sufficient for this purpose, as it is not of itself a complete irrevocable pardon. (4)

Sect. II.

Of the Admissibility of Accomplices.

It has been before mentioned, that, unless the conviction and judgment are proved, a witness is not incompetent from infamy of character, though he may confess himself guilty of an infamous crime. Nor is it a sufficient objection to his competency, that he has been an accomplice in guilt with the prisoner at the bar. The evidence of accomplices has been at all times admitted (5), from a principle of public

(1) 2 H. P. C. 278. R. v. Greepe, 2 Salk. 514; 1 Lord Raym. 256. S. C. R. v. Ford, 2 Salk. 690. Crosby's case, 2 Salk. 689. Bull. N. P. 292. Hawk. b. 2. c. 46. s. 112. R. v. Warden of the Fleet, Rep. Temp. Holt, 135. Anonym. case, 3 Salk. 155.

(2) Hawk. b. 2. c. 37. s. 45.

(3) Hawk. b. 2. c. 37. s. 45. Burridge's case, 3 P. Wms. 485.

(4) Gully's case, Leach Cr. C. 116. Hawk. b. 2. c. 37. s. 50.

(5) 1 H. P. C. 303. Hawk. b. 2. c. 46. s. 94. Gilb. Ev. 123. Rookwood's case, 4 St. Tr. 663. Atwood's case, cited by Grose J. 7 T. R. 609. Westbeer's case, Leach Cr. C. 14.

 policy

policy and from necessity, as it is scarcely possible to detect conspiracies and many of the worst crimes without their information. But though accomplices are received as witnesses, their testimony ought to be received by a jury with considerable caution and distrust: for, on their own confession, they stand contaminated with guilt, and in the hope of lessening their own infamy will often be tempted to throw as much guilt as possible upon the prisoner. They may be also in some cases entitled to rewards on the prisoner's conviction, and in all cases expect to earn a pardon; and as fear is usually their motive, the same feeling may tempt them to exaggerate their evidence, for the purpose of destroying their former associate and securing themselves against his vengeance.

The practice of admitting accomplices to give evidence against their associates, has been adopted from analogy to the ancient doctrine of approvement, a part of the old law, which, though now grown obsolete, may properly be mentioned here, from its affinity to the more improved modern usage substitued in its place (1). Approvement is, when a prisoner, arraigned on a capital charge, confesses the fact before plea pleaded, and accuses his accomplices of the same offence. He must also discover upon oath, not only the particular crime charged upon him, but all treasons and felonies of which he can give any information. It is then in the discretion of the Court either to refuse or admit him to be an approver; and if on his confession it appears that he was a principal, and tempted the others, he ought not to be received. But if he does not discover the whole truth, or, on the trial of the appeal, the party accused should be acquitted, judgment of death passes against him upon his own confession of the indictment.

This practice of allowing approvements, which was at all times in the discretion of the Court, is now grown into

(1) Rudd's case, Cowp. 335.

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disuse, and entirely discontinued; more mischief having arisen from false accusations under pretence of approving, than benefit to the public by the discovery and conviction of real offenders (1). Whatever good was to be expected from this old method, is now more effectually provided for and secured, First, by several acts of parliament, which enact, in cases of robbery (2), coining (3), burglary (4), housebreaking (4), horse stealing (4), privately stealing to the value of five shillings from shops, warehouses, stables and coach-houses (4), or uttering counterfeit money (5), that, if any such offender, being out of prison, shall discover two or more persons, who have committed the like offences, he shall be entitled to pardon for such crime, on their conviction: Secondly, by special proclamations in the Gazette or otherwise, promising pardon on certain conditions: and, Thirdly, by the modern practice of admitting accomplices to give evidence for the crown, under an implied promise of pardon, on condition of their making a full and fair confession of the whole truth, that is, of all the offences about which they may be questioned, and of all their associates in guilt (6). On a strict and ample performance of this condition, to the satisfaction of the judge presiding at the trial, they have an equitable title to a recommendation for the king's mercy. It is not, however, a matter of course, to admit an offender as witness on the trial of his accomplices, not even after he has been so allowed by the committing magistrate; but a motion for this purpose must be made by the counsel for the prosecution, and the Court, under all the circumstances of the case, will either admit or disallow such evidence, as may most effectually answer the purposes of justice. (7)

The general rule then is, that a person, who confesses himself guilty of a crime, is a competent witness against his

(1) 2 Hale P.C. 227. ch. 29.
(2) St. 4 W. M. c. 8. s. 7.
(3) St 6 W. 3. c. 17. s. 12.
(4) St. 10 W. 3. c. 23. s. 5. St. 5. Ann. c. 31. s. 4.
(5) St. 15 G. 2. c. 28. s. 4.
(6) Rudd's case, Cowp. 339.
(7) Per Buller J. Maidst. Ass. 1798, Crown Circ. Com. last edit. 51.

partners

partners in guilt. Thus, if two or more persons are accomplices, one who is not indicted, may be witness against the others, though he may have a promise of pardon or reward on condition of giving evidence against the prisoner (1): so he may even after conviction, if judgment has not passed upon him; for it is not the conviction, but the judgment that creates the disability. So, on the trial of one of several persons, who are indicted separately, the others, who have not been convicted, may be witnesses in his behalf (2). It was formerly thought, from analogy to the ancient doctrine of approvement, that an accomplice, separately indicted for the same offence, could not give evidence against the others, unless he had first pleaded guilty to his indictment (3): but the rule is now settled as above stated. On the trial of an accessary (4), for a misdemeanor in receiving stolen goods, under stat. 22 G. 3. c. 58., the principal felon is a competent witness; the statute enacting, that the accessary may be proceeded against, although the principal felon has not been convicted, and whether he be or be not amenable to justice. So, the principal felon may be a witness, in a prosecution on stat. 4 G. 1. c. 11., for taking a reward to help to stolen goods. (5)

The evidence of accomplices is also admitted on the trial of smaller offences. Thus, in an information under stat. 2 G. 2. c. 24., for bribery at an election, a person, who had received a bribe, was admitted a witness against the defendant, though in case of a conviction he would have been indemnified from the penalties of the act (6). In an action of trespass, a co-trespasser who is not sued, may be

(1) Tonge's case, Kel. 17. 1 H. P. C. 303. S. C. Layer's case, 10 St. Tr. 259. Hawk. P. C. b. 2. c. 46. s. 135.

(2) Case of Bilmore and others, 2 H. P. C. 279. 1 H. P. C. 305. Gunston and Downes, 2 Roll. Ab. 685. pl. 3. Hawk. b. 2. c. 46. s. 99. Gilb. Ev. 118. Bath v. Montague, cited Fortesc. Rep. 247.

(3) Sir P. Cresby's case, 1 H. P. C. 303.

(4) Haslam's case, 1 Leach Cr. C. 467. Price's case, ib. 468. n. (1.) Patram's case, 2 East P. C. 782.

(5) Wild's case, 2 East P. C. 782.

(6) Bush v. Rawling, Say. 289. cited by Lord Mansfield Cowp. 199. Snead v. Robinson, Willes, 423. and n. (c), ib. 425.

witness

witness against the defendant, though left out of the declaration for that purpose, and although satisfaction from one is a discharge for all the rest (1). A person who has set his name as subscribing witness to a deed or will, may be a witness to prove the instrument a forgery. (2)

Since accomplices are competent witnesses, it necessarily follows, that, if their evidence is believed by a jury, a prisoner may be legally convicted upon it, though it be unsupported by other proof (3). But their testimony *alone* is seldom of sufficient weight with a jury to convict the offenders; the temptation to commit perjury being so great, where the witness by accusing another may escape himself (4). The practice, therefore, is to advise the jury to regard the evidence of an accomplice, only so far as he may be confirmed, in some part of his testimony, by unimpeachable testimony. It is not necessary, that he should be confirmed in every circumstance, which he details in evidence: for there would be no occasson to use him at all as a witness, if his narrative could be completely proved by other evidence free from all suspicion. Nor need it appear from the confirmatory evidence, that he speaks truth with respect to all the prisoners, or with respect to the share which each had in the transaction. But if the jury are satisfied, that he speaks truth in those parts, in which they see unimpeachable evidence brought to confirm him, that is a ground for them to believe, that he also speaks truly with regard to the other prisoners, as to whom there may be no confirmation. (5)

The cases which have been mentioned, respecting the evidence of accomplices, and on the admissibility of persons

(1) Bull. N. P. 286. Luttrel v Reynel, 1 Mod. 283. Chapman v. Graves and others, 2 Campb. N. P. C. 333. n.

(2) 7 T. R. 604. 611. 6 East. 195

(3) Atwood's case, 2 Leach Cr. C. 521. Durham's case, Ib. 538. Per Lord Ellenborough C. J. in R. v. Jones, 2 Campb. 133, S. P. 7 T. R. 609.

(4) Per Lord Mansfield C. J. Cowp. 336.

(5) Per Thompson, B. R. v. Swallow and others, Trial at York, Jan. 1813, on special commission, p. 15. See also p. 3. 50. 150. 165. 201.

to prove the forgery of an instrument which they have signed as subscribing witnesses, clearly shew, that a man's guilt in the transaction disclosed is not a sufficient reason for rejecting his testimony, however it may affect his credibility. In the case of Walton v. Shelley (1), which was an action upon a bond given by the defendant, in consideration of delivering up certain promissory notes, the Court of King's Bench held that the indorser of one of the notes ought not to be allowed to prove the consideration of the note usurious, on a supposed principle of public policy, "that no party who had signed a paper or deed shall ever be permitted to give testimony to invalidate that instrument; because every man, it was said, who is a party to an instrument, gives a credit to it: And it is of consequence to mankind, that no person should hang out false colours to deceive them, by first affixing his signature to a paper and afterwards by giving evidence to invalidate it." This appears to have been the first case in support of such a rule. In the later case of Jordaine v. Lashbrooke (2), this subject was very fully discussed; and the Court there determined, that in an action on a bill of exchange against the acceptor, the payee (who was also indorser) was a competent witness for the defendant to prove, that the bill, which was unstamped, and purported to be drawn at Hamburgh, was in fact drawn in London, and therefore void for the want of a stamp. "I find no rule, said Mr. Justice Lawrence in delivering his opinion, less comprehensive than this, that all persons are admissible witnesses, who have the use of their reason and such religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and are not influenced by interest. Under none of these classes does the witness in this case fall. Whether a defendant shall be allowed to set up such a defence is quite another consideration, than whether the witness be competent. It certainly is of con-

(1) 1 T. R. 296.

(2) 7 T. R. 601, Ashurst J. *contr.* See 4 Taunt. 604.

sequence to prevent men from hanging out false colours: but this must be applied to the *parties in the cause*, or you may prejudice men who have not hung out such colours."

CHAP. V.

Of the Incompetency of Witnesses from Interest.

THE fourth ground of incompetency is on account of interest. It is a general rule, that all witnesses interested in the event of the cause are to be excluded from giving evidence in favour of the party to which their interest inclines them. They are excluded from a supposed want of integrity; and not, as some have supposed, that they may be saved from the temptation to commit perjury. If that were the true principle, there would be some inconsistency in excluding witnesses who have an interest even to the smallest amount, at the same time that a son is allowed to give evidence for the father, and a witness is not privileged from answering, when called to speak *against* his interest. The temptation to perjury may be much stronger in these two last cases, than in the former; yet in the one the witness will be *permitted*, in the other *compelled* to give evidence. "Where a man, says Chief Baron Gilbert, who is interested in the matter in question, comes to prove it, it is rather a ground for distrust than any just cause of belief; for men are generally so shortsighted as to look at their own private benefit which is near to them, rather than to the good of the world, that is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biassed testimony, than to believe it." Perhaps it may appear rather doubtful, whether such an exclusive rule has answered the purposes for which it was intended, and whether upon the whole it may not have contributed to obstruct rather than to promote

mote the ends of public justice. It is certain, that Courts of justice now generally adopt the principle, that it is wiser to hear the witness than at once to reject him unheard and untried; and they endeavour as far as possible, consistently with former decisions, to receive the testimony of witnesses, leaving it afterwards to the jury to consider, how far it has been supported by other evidence, or from its own character may be entitled to credit. The legislature also shews, that it acts upon the same principle, by having provided in many instances for the admissibility of witnesses, when they must otherwise have been rejected as incompetent.

In treating of the incompetency of interested witnesses, it is proposed to consider the subject in the following order;

First, with respect to the *nature* of the interest, which will disqualify;

Secondly, of the rule on the subject of interest, considered with reference to the parties in the suit;

Thirdly, of the same rule considered with reference to the husband or wife of the party;

Fourthly, of the effect of admissions by a party to the suit or his agent, *against* the party's interest.

Fifthly, of the admissibility of the confession of a prisoner against himself;

Sixthly, of the competency of the party injured, as witness in criminal prosecutions;

Seventhly, of certain exceptions to the general rule on the subject of interest; and

 Lastly,

Lastly, of the means by which the competency of an interested witness may be restored.

SECT. 1.

Of the Nature of the Interest, which disqualifies a Witness.

IT is scarcely possible to reconcile the earlier cases on this subject with those of a more recent date. The old cases respecting the incompetency of witnesses, were generally decided on very narrow grounds. Evidence, which ought to have been admitted, although received with caution, was at once excluded without being heard; as if juries were not to be trusted with all the means of deciding right, because it was possible their decision might be wrong. At one time it was generally held, that, if a witness had an interest in the *question* put to him, he was incompetent. Thus it has been laid down in some of the earlier cases as a general rule, that one commoner cannot be a witness for another commoner: and that in an action on a policy of insurance one underwriter cannot be a witness for another. But a distinction has since been made between an interest in the *question* put to a witness and an interest in *the event of the suit* (1); and the general rule now established is, that a witness will not be disqualified on the ground of interest, unless he is interested in the event of the suit. The question then resolves itself into this, whether the witness, proposed to be examined, has an interest in the event. In considering this subject, the simplest method will be to ascertain, in the first place, what is not such an interest in the event as will disqualify a witness from giving evidence, and then to enquire what is such an interest as will disqualify him.

It is not an objection to the competency of a witness, that he may have wishes or a strong bias on the subject matter

(1) 1 T. R. 302. 3 T. R. 36. 7 T. R. 603.

of

of the suit, or that he may expect some benefit from the result of the trial. Such circumstances may influence his mind, and affect his credibility; they are therefore always open to observation, and ought to be carefully weighed by the jury, who are to determine what dependence they can have on his testimony; but they will not render him incompetent. A witness who stands in the same situation as the party, for whom he is called to give evidence, is under a strong bias, but is not on that account disqualified. Thus if there are two actions brought against two persons for the same assault, in the action against one the other may be witness (1); or if several persons are separately indicted for perjury in swearing to the same fact, either of them before conviction may be a witness on the trial of the others (2). So in Rudd's case (3), a woman, whose husband had been before convicted, was admitted to give evidence against the prisoner, though she expected that, in case of his conviction, her husband would receive a pardon. So in the case of Bent v. Baker, which was an action against an underwriter on a policy of insurance, the court held after much argument, that another underwriter was a competent witness (4). This case came before the Court of King's Bench by writ of error from the Court of Common Pleas: a writ of error was afterwards brought to reverse the judgment of that court, but was at length abandoned (5). It has always been considered a case of great authority, and deserves to be particularly noticed, as it is one of the leading cases which have established the rule of evidence on this subject. The principal question in that case was, whether a person, who had been employed as broker by the plaintiff in procuring the policy to be subscribed by the defendant, and had afterwards himself subscribed the policy as assurer, was a competent witness for

(1) Per Buller J. 1 T. R. 301.

(2) Bath v. Montague, cited Fortesc. Rep. 247. Gunstone v. Downes, 2 Roll. Abr. 685, Art. 3; S. C. cited 2 H. P. C. 280, and in R. v. Gray, (or Bray), 2 Sel. N. P. 1046.

(3) 1 Leach Cr. C. 151.

(4) 3 T. R. 27. Bull. N. P. 283, S. P.

(5) 7 T. R. 634.

the defendant. The court adjudged that he was competent; Lord Kenyon, C. J., Mr. Justice Buller, and Mr. Justice Grose held, that he ought not to have been rejected, on the broad and general ground, because he was not interested in the event; Mr. Justice Ashurst, on a narrower ground, because the witness stood in the particular situation of broker, and having made himself a party to the policy he ought not to be allowed by his own act to deprive either party of the benefit of his testimony. The other judges concurred in that opinion; but Lord Kenyon C. J. declared, that the other was the principal ground of his opinion. He said, "The objection is, that the witness was underwriter on the same policy. I must acknowlege, that there have been various opinions upon this subject, and that it is impossible to reconcile all the cases. Then we have only to consider what are the principles and good sense to be extracted from them all. I think the principle is this; if the proceeding in the cause cannot be used for him, he is a competent witness, altho' he may entertain wishes upon the subject: for that only goes to his credit, and not to his competency."

For the same reason, a witness is not incompetent on the ground, that the verdict may afterwards come to the hearing of a jury in an action brought by the witness himself, and so have an influence on their judgment, though not in evidence before them. Lord Holt, indeed, in the case of the King v. Whiting (1), on an indictment for a cheat, in obtaining a person's subscription to a note of 100l. instead of 5l., rejected the evidence of the maker of the note; Lord Holt said, the verdict would be certainly heard of, in an action on the note, to influence the jury. This decision was followed by Lord Hardwicke C. J. in the case of the King v. Nunez (2): but afterwards in the case of the King v. Bray (3) Lord Hardwicke reviewed his own opinion and

(1) 1 Salk. 283.
(2) 2 Stra. 1043.
(3) Rep. Temp. Hard. 358.

that

that of Lord Holt, and decided that the objection went only to the credit and not to the competency of the witness; and with respect to the possibility that the jury might hear of the verdict, he said, that sitting as judge he could only hear of it judicially. Thus, where A having brought an action against B (who filed a bill in equity for an injunction, and after answer put in by A, denying the allegations in the bill, the injunction was dissolved,) A was afterwards indicted for perjury alleged to have been committed in his answer, and the indictment came on to be tried immediately before the action, the Court of King's Bench determined that B was a competent witness and had been properly admitted to give evidence on the trial; as he could not avail himself of the conviction of A in any civil proceedings between them either in law or equity (1). So a person, who has borrowed money on an usurious transaction, is a competent witness for the plaintiff in an action for penalties against the lender (2); and, whether he has or has not repaid the money lent, does not appear to make any essential difference, at least so far as his *competency* is affected *; for in neither case does he gain any thing immediately by the event of the suit, nor can he give the judgment in evidence in an action against him for the money lent. A mere contingent benefit, then, which

(1) R. v. Boston, 4 East. 572. See *post*, Sect. VI.

(2) Abrahams q. t. v. Bunn, 4 Burr. 2251. Smith v. Prager, 7 T. R. 60. See Masters v. Drayton, 2 T. R. 496.

* In the case of Smith q. t. v. Prager, the witness said he had repaid the principal sum and interest by drafts which had been duly honoured, and that he was still indebted to the defendant on a running account for this and other loans. It may be observed, that at the time of the trial the witness was an uncertificated bankrupt: but this was not considered as furnishing any objection. (See Masters q. t. v. Drayton, 2 T. R. 496. See also Ridley v. Taylor, 13 East, 175.) In the first case cited, of Abrahams q. t. v. Bunn, the witness proved, that he had redeemed the pledges and repaid the principal sum, and he was competent to prove that fact. Lord Mansfield is reported to have said, "that if the defendant had produced a security or proved the pledge to be remaining in his custody, it would have been a different consideration, whether the witness who was the borrower of the money could be examined to contradict this." However it may be inferred from the case of Jordaine v. Lashbrooke which has been before mentioned, that this consideration would not now effect the *competency* of the witness. See *Supra*, p. 33.

may result to the witness from the event of the suit, (as, that it may possibly be more easy for him to establish his own claim, in case the party calling him should succeed,) can only affect his credit and not his competency, unless the verdict would be evidence for him.

Upon the same principle, a witness, who has acted under a bare authority, is not to be excluded from giving his testimony, on the ground, that he may be liable to an information or an action, in case the fact, which he comes to prove, should be found otherwise (1). Thus persons, who have been themselves in office, are often called to shew what the usage is, and what they did when in office; yet if their acts be illegal, they are liable to a quo warranto (1). If persons were not allowed to be competent witnesses in matters belonging to corporations, because they may possibly be punished by information, much good evidence would be shut out. Wherever any unlawful act is done in a corporate assembly, the whole assembly are liable to an information; yet the persons who were present at such assemblies are always allowed to be good witnesses; and if they were not allowed, there would be no evidence at all as to such facts (2). So a witness may prove a codicil made subsequent to a second will, and reviving a former will, though he has acted under the first will, and might be liable to actions as executor de son tort, if it should be set aside (3). Indeed, it may be laid down as a general rule, that executors in trust, trustees, and agents, are not incompetent merely on the ground of their liability to action. (4)

(1) R. v. Bray. Rep. Temp. Hard. 360; 2 Sel. N. P. 1045, S. C. 2 Str. 1069, S. P. Baillie v. Wilson, cited 4 Burr. 2254. See Carpenter's Company, &c. v. Hayward, 1 Doug. 374.

(2) By Lord Hardwicke, C. J. R. v. Gray, (or Bray), 2 Selw. N. P. 1045.

(3) Baillie v. Wilson, cit. 4 Burr. 2254. Goodtitle d. Fowler v. Welford 1 Doug. 140.

(4) 1 Mod. 107. Goss v. Tracy, 1 P. Will. 287. 1 Black. Rep. 366. Gilb. Ev. 123. Goodtitle v. Fowler, 1 Doug. 140. Bettison v. Bromley, 12 East 250. See 1 Ball & Beatty's Rep. 100. 414, and cases there cited, as to the rule in equity.

In

In the cases which have been mentioned, the objection against the witness was, that, either from the circumstance of his standing in the same situation as the party for whom he was called, or because the verdict might possibly influence the jury in a cause in which he himself might be party, or from some other cause of the same kind, that he expected a benefit from the result of the suit. The witness in those cases would probably have admitted, that he *thought himself* interested; it was upon the supposition of this fact, that the objection must have been founded. Those cases, therefore, in which such objections were over-ruled, appear to have determined this point, that a witness will not be incompetent merely on the ground of his *thinking* himself interested. It is true, if he believes himself interested, the impression on his mind, and his bias in favour of the party calling him, may be as strong, as if he were legally incompetent. But the difference is, that in the one case the inquiry is more simple and more easily defined; in the other, it is complicated, vague, and uncertain. For the purpose of determining that a witness is incompetent on account of his believing himself interested, it might be necessary to examine him on a great variety of points, which after all would be more proper for the consideration of the jury, as for example, on the nature of the benefit which he expects, the reasons for his expecting it, and the impression which such an expectation may have produced upon his mind. Such an inquiry would in all cases be extremely indefinite, and would be subject to this great inconvenience, that it might lead to the rejection of a witness, who on further examination might appear to deserve the highest credit, and might have it in his power to give important evidence. The rule of law respecting interested witnesses is perhaps the best that could be adopted, because it is the least exclusive and most accurately defined. It excludes such only as have an interest in the event of the suit; not that in all cases they are likely to feel a stronger bias than persons, who may perhaps expect some benefit from the event, or may be friends or relations to the party, and yet are not on that account incompetent; but the

the kind of interest, which is marked out as the cause of incompetency, is in general more direct and immediate, and more easily ascertained. It has been held, therefore, that a witness is not incompetent, who believes himself under an obligation of honour to indemnify the bail, unless he has in fact entered into an engagement to that effect (1). Such an obligation is in general of a nature so uncertain and variable, that it cannot safely be recognized in courts of justice as a motive of conduct. Besides, where the sense of honour is so strong and binding as to influence him against his interest, it must be unnecessary to reject the witness, as the same principle, which would induce him to pay the costs, would oblige him in giving his evidence to speak only the truth; and in cases where the sense of honour is less firm and imperative, the ground of the objection fails, since the witness is not bound in point of law, and does not feel himself absolutely bound in point of morals. But, independent of this reasoning, another more general answer is, that the ends of justice are more effectually attained by a full and complete investigation of the subject in dispute, and unless the objection to the witness is strictly a legal objection, he will be admitted to give evidence. In the case supposed, of a witness who says he thinks himself bound in honour to pay the costs, it might be injurious to the party who calls him to be deprived of his testimony on account of such a fancied obligation; more especially as it is an obligation which may easily be pretended by the witness, but which it is scarcely possible for the court justly to appreciate, and which from the nature of the case the party cannot release, nor yet enforce against the witness; on the other hand, his testimony may not deserve all the credit due to a witness free from bias, and it ought therefore to be strictly examined and sifted. The witness, then, is to be heard, but his evidence is open to observation.

(1) Pederson v. Stoffles, 1 Camp. 145. S. P.; said to have been ruled *contrà*, in an old case, by Parker C. J.; See Fotheringham v. Greenwood, 1 Str. 129.

How-

However, it is to be observed, there are several dicta in favour of the position, that a witness is not competent, if he *believes himself* interested, whether he is or is not interested in strictness of law (1). But these dicta were not the ground of the determination in the cases then before the Court, nor was it necessary to determine the point; and further, the general rule of law on the subject of interest was not at that time so clearly settled, as it has since been by many later authorities. In a late case (2), before the High Court of Admiralty, an objection was made to the evidence of a witness, who had acknowledged in his answer "that he could not say he was not interested, inasmuch as he conceived he would be entitled to share, if his vessel should be pronounced a joint captor, though he had signed a release;" on the other side it was contended, that as he was clearly not interested, the effect of his impression was no more an objection in this case, than in those in which the expectation depended only on the bounty of the parties. But Sir William Scott rejected the evidence, observing, "he had always understood the distinction to be, that, if the witness says only that he expects to share from the bounty of the captors, he is not disqualified or rendered incompetent, whatever may be the deduction of credit to which he is exposed. But if he thinks himself entitled in law, he acts under an impression of interest, which renders him incompetent, however erroneous that opinion may be."

Having shewn what is not such an interest in the event of the suit, as will disqualify a witness from giving evidence, we now proceed to inquire what is such an interest as will disqualify him.

If the witness can avail himself of the verdict, so as to give it in evidence in support of his own claims, or if the

(1) By Pratt C. J. in Fotheringham v. Greenwood, 1 Str. 129. cited and approved by Lord Loughborough C.J., and by Gould J. in Trelawnay v. Thomas, 1 H. Bl. 307. S. P. by Perryn B. in Newland's case, 1 Leach, Cr. C. 353.

(2) Case of the Amitié, Villeneuve, 5 Robinson, Adm. Rep. 344. n.

verdict

verdict can be used in evidence against him, in case the party, for whom he is called as witness, should fail in the action, this is a direct and immediate interest in the event of the suit, which will render him incompetent (1). Thus where a right of common is claimed by custom, one who claims under the same custom cannot be a witness in support of the claim, as he might afterwards use the verdict in his own cause to establish a similar customary right for himself (2). It may perhaps be said, that, if he were allowed to be a witness, he could not afterwards use the verdict; for, on the trial of his own cause, if it should appear that he was witness in the former suit, to admit the verdict as evidence for him would be in effect allowing a party to give evidence for himself. The answer to this objection seems to be, that the fact of his having given evidence in the former case would probably be unknown at the time of the second suit; and, even if that fact should be fully proved, yet it would be presumed, that he was disinterested, and then the verdict might perhaps be evidence for him, upon the same principle which allows the depositions of a witness in a suit in equity to be evidence for him on a bill of revivor brought by the witness himself (3). A commoner, then, is not competent to support a custom, under which he himself claims. So in an action on the case by a commoner against the defendant, for not repairing his fences contiguous to a common, where one of the points in issue was, whether the defendant was liable to repair by reason of his occupation, it has been determined that other persons, who claimed a right of pasture over the same common, were not competent witnesses for the plaintiff (4), because the record would be evidence for another commoner, that the occupier of the adjacent land was bound to repair this fence; and though the plaintiff in that case claimed a right of common by prescription, in right of a particular mes-

(1) 3 T. R. 32, 33. 36. 7 T. R. 52. 4 East, 582.

(2) 1 T. R. 302. 3 T. R 32. Bull. N. P. 283. Hockley v. Lamb, 1 Lord Raym. 731.

(3) Goss v. Tracy, 1 P. Wms. 288.; 2 Vern. 699. S. C. Haws v Hind, 2 Atk. 615.

(4) Anscomb v. Shore, 1 Taunt. 261.

suage,

suage, still the other commoners, by whatever title they might claim, would have a common interest in casting the burthen of the repair of this individual fence upon the occupier of the adjacent land. So where the question is, whether in a particular parish or vill certain things are generally exempted from tithes, or subject only to a modus, no persons who would be subject to tithes, if the parson's claim were to be allowed, can give evidence in support of the modus or exemption (1). So where a defendant in an action of trespass justifies under a custom in the parish for out-going tenants to take the away-going crop, he cannot call as witness an occupier of land, who insists upon the same right for himself. But where the issue does not affect any common right, but is merely on a right of common claimed by prescription as belonging to the estate of A, one who claims a prescriptive right of common in right of his own estate may be a witness (2); for though A may have such a right of common, it does not follow that B has, nor would the verdict in the action of A be evidence in B's action.

"It is no good objection to a witness, says Ch. B. Gilbert (2), that he has common *by cause of vicinage* in the lands in question, for this is no interest in the land, but only an excuse for trespass; and let who will recover the lands, the whole right of common remains, so that he is certainly indifferent in point of interest between the two contenders." However, this position may perhaps be doubted, as the rule is now clearly established, that a witness, who can use the verdict in an action brought either by or against himself, is not competent; and since common *by cause of vicinage* is in the nature of common appendant, and implies immemorial usage of intercommoning, it is presumed, that a verdict, finding the existence of such an usage, would be evidence for the witness, if he were to

(1) Ld. Clanricard v. Ly. Denton, 1 Gwill. 360. Gilb. Ev. 113. stated 1 Sel. N. P. 449. 1 T. R. 302. Bull. N. P. 283.

(2) Harvey v. Collison, MS. case

(3) Gilb. Ev. 109.

justify

justify under the same usage in an action of trespass. It may be observed, that Ch. B. Gilbert does not once mention the power of using the verdict as a criterion for determining whether the witness is incompetent; so undefined at that time was the rule of evidence on this subject.

Persons liable to the costs of the action have an immediate interest in the event, and therefore are not competent witnesses. For the same reason, the defendants' bail are not competent to give evidence for their principal (1), because they are immediately answerable in case of a verdict against the defendant. So, in an action against a sheriff for a false return, the sheriff's officer, who has given security for the due execution of process, is not a competent witness, to prove that he endeavoured to make the arrest (2). So, in an action by an infant plaintiff, his prochein amy or guardian are not competent witnesses for him, as they are liable to costs (3). So, in an action against a master for the negligence of his servant, the servant is not a competent witness to disprove his own negligence; for, the verdict may be given in evidence, in a subsequent action by the master against the servant, as to the quantum of the damages, though not as to the fact of the injury (4). So, in an action of assumpsit for goods sold and delivered, the plaintiff having proved the sale of the goods to the defendant and one J. S. who were partners in trade, Lord Kenyon held that J. S. could not be a witness for the defendant, to prove that the goods were sold to himself, and that the defendant was not concerned in the purchase except as his servant; for, said Lord Kenyon, by discharging the defendant he benefits himself, as he will be liable to pay a share of the costs to be recovered by the plaintiff (5). So in an action by an indorsee against the

(1) 1 T. R. 164.

(2) Powell v. Hord, 2 Ld. Raym. 1411.; 1 Str. 650. S. C. 3 Campb. 523.

(3) James v. Hatfield, 1 Str. 548. Hopkins v. Neal, 2 Str. 1026. Gilb. Ev. 107.

(4) Green v. New R. Company, 4 T. R. 589. Martin v. Henrickson, 2 Ld. Raym. 1007. Miller v. Falconer, 1 Campb. 251. 15 East, 474. 3 Campb. 516.

(5) Goodacre v. Breame, Peake N. P. C. 174.

 acceptor

acceptor of a bill of exchange, which had been accepted for the accommodation of the drawer, the drawer is not a competent witness for the defendant to prove that the holder took the bill for an usurious consideration. This was lately determined in the case of Jones v. Brooke (1). The Court of Common Pleas there held, that the witness was interested to defeat the action; for, if the holder should succeed against the acceptor, the acceptor would not only have a right of action against the drawer for the principal sum, but also for all damages, which as acceptor he might sustain in being sued upon the bill; the drawer of an accommodation bill being bound to indemnify the acceptor against the consequences of his acceptance for the drawer's accommodation.

Upon the same principle it has been determined, that, on an appeal against an order of removal, if the appellants prove a settlement in a third parish, the rated inhabitants of that parish are not competent witnesses for the respondents to disprove it; as the confirmation of the order of removal would be conclusive evidence for the inhabitants of the third parish, that the settlement of the pauper was at that time in the appellant parish (2). It would indeed be quite as conclusive in favour of any other parish in the kingdom; so that the proposed witness had a greater interest in the question than any other person, only in proportion as there was a greater probability, that, if the appellants failed in this appeal, they would afterwards remove the pauper to his parish. Such an objection, however, is now removed by the statute 54 G. 3. c. 170. the 9th section of which enacts, "that no inhabitant or person rated or liable to be rated to any rates of any district, parish, &c., shall be deemed to be by reason thereof an incompetent witness for or against such district, &c., in any matter relating to such rates, or to any order of removal to or from such district, &c., or to the

(1) 4 Taunt. 464. Maundrel v. Kennet, 1 Camph. 408. See also Trelawny v. Thomas, 1 H. Bl. 306. and Ball v. Bostock, 1 Str. 575. as to the incompetency of witnesses liable to costs.

(2) R. v. Terrington, 15 East, 471.

settle-

settlement of the pauper in such district." Before this provision, it had been decided, that inhabitants would not be incompetent merely from having rateable property in the parish, if it did not appear that the property was actually rated at the time of the appeal; and this, although it was omitted in the rate, for the very purpose of introducing their evidence (1). The Court held, that in order to disqualify a witness, there must be an actual existing interest at the time, not merely one that is expectant and contingent; and that, by taking the witness off the rate, his immediate interest was so far taken away, that it could not render him incompetent, whatever objections might still be made against his credibility.

In an action of ejectment, the tenant in possession, upon whom an ejectment has been served, is not a competent witness in support of the title of the defendant under whom he holds; for he is liable to the mesne profits, and the verdict in ejectment would be evidence against him in an action to recover them (2). So a witness, to whom the lessor of the plaintiff has agreed to demise the lands in question, in case he shall recover them by the verdict in ejectment, would not be competent to give evidence against the defendant; because, in an action for the non-performance of that agreement, the verdict would be evidence for him to prove the fact of the lands having been recovered. To this effect Ch. B. Gilbert has laid it down (3), that if a man promise a witness, that in case he recover the lands he shall have a lease of them for so many years, this excludes the evidence, for then the witness would have a fixed and certain advantage by the event of the verdict. So a witness has been rejected, who, if the plaintiff failed in the action, was to repay a sum of money in his hands belonging to the plaintiff, but was not to repay any part of it, if the plaintiff suc-

(1) R. v. Prosser, 4 T. R. [illegible] R. v. Little Lumley, 6 T. R. 157. R. v. Kirdford, 2 East, 561.

(2) Bourne v. Turner, 1 Str. 632. Doe d. Forster v. Williams, Cowp. 621.

(3) Gilb. Ev. 108. citing a dictum of Twisden J. in 1 Mod. 21.

ceeded

ceeded (1). And in the case of Forrester v. Pigou (2), an action on a policy of insurance, where the defendant called another underwriter as witness, who in his examination on the voire dire said, he had paid the loss to the plaintiff upon an undertaking, that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff promising to return the money in that event, Lord Ellenborough C. J. on the trial rejected the witness. On a motion afterwards for a new trial on account of this rejection, the Court sent the case to be retried, for the purpose of ascertaining more particularly the time when the undertaking was made to the witness; but on that occasion Lord Ellenborough said, "if a person, who is under no obligation to become a witness for either of the parties to the suit, choose to pay his debt beforehand, upon a condition that it is to be determined by the event of that suit, he becomes as much interested in the event as if he were a party to a consolidation rule."

The rule, that a witness is not competent, if the verdict can be given in evidence either for or against him in a future suit, is of all the rules on this subject the most comprehensive, and at the same time the most accurately defined. And if this were the single criterion for ascertaining whether the witness is incompetent, the question of interest, which now is often a question of difficulty, would be greatly narrowed. Lord Kenyon seems disposed to consider this rule as the only true test of competency. In the case of Bent v. Baker (3), he says, "it is to be considered, what is the question put to a witness on his voire dire? It is, is he really interested in the cause? Sometimes, indeed, the counsel enter into the detail, and ask *how* he is interested? But the general question involves in it all the others, and amounts to this, whether the record in that cause will affect his interest?" Then again he says, "I think the principle is this, if the proceedings in the

(1) Fotheringham v. Greenwood, 1 Str. 129.

(2) 1 Maule & Sel. 9.

(3) 3 T. R. 32. and see 7 T. R. 62.

cause cannot be used for him, he is a competent witness, although he may have wishes upon the subject." And Mr. Justice Buller in the same case says, "The true line I take to be this, is the witness to gain or lose by the event of the cause? Now this witness could not gain or lose by the event of this suit, because the verdict could not be evidence either for or against him in any other suit." However, it will appear from a variety of cases, that witnesses have been considered incompetent on account of interest, although the proceedings in the suit could never be used in evidence either for or against them.

On the subject of interested witnesses, Ch. B. Gilbert lays down the rule thus (1), "the law looks upon a witness as interested, where there is a certain benefit or disadvantage to the witness attending the consequence of the cause one way." Mr. Justice Buller adopts the same rule (2). So, in the case of the King v. Prosser (3), where the question was, whether, on an appeal against a rate, parishioners, who had rateable property but were not actually rated, were competent witnesses in support of the rate, the same learned judge expressed himself thus, "I take the rule to be this; if the witness can derive no benefit from the [illegible] the Court, (meaning evidently from the contest, no *immediate* benefit,) he is competent." And it appears to be established by a variety of cases, that a certain direct and immediate interest will disqualify, although it may happen that the verdict in the cause cannot be evidence, either for or against the witness in any future suit concerning that interest. The following examples may be cited to illustrate this general rule.

1. Rated parishioners were always considered incompetent, before the late act of parliament (4), to give evidence for their parish in appeals against orders of removal, on

(1) Gilb. Ev. 106, 7.
(2) Bull. N. P. 284.
(3) 4 T. R. 20.
(4) St. 54 G. 3. c. 170. § 9.

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the ground that they were directly and immediately interested in the event of the proceeding, by which the maintenance of the pauper and the costs of the appeal might be fixed upon their parish, and have the effect of increasing their proportion of the rates. (1)

2. A devisee, who takes an interest under a will, is not competent to speak to the testator's sanity, in an action of ejectment by another devisee against the heir at law.

3. A bankrupt is not a competent witness in an action by his assignees to prove property in himself or a debt due to himself (2), or in any other manner to increase the fund. Nor can he prove his own act of bankruptcy, or the petitioning creditor's debt, or any other part necessary to support the commission, not even after obtaining a certificate, and executing a release of his share in the surplus; for if the commission is not good, the certificate and all the proceedings are void, and the bankrupt will be liable again to his debts, from which the certificate would discharge him (3). For the same reason he cannot be questioned as to any antecedent act of bankruptcy, either in his examination in chief or in his cross examination (4). And on a second commission of bankruptcy, a certificated bankrupt cannot be a witness for the assignees under that commission, unless he has paid 15 shillings in the pound, for in the event of his not making that payment under the second commission, his future effects are liable. (5)

4. A creditor of a bankrupt is not competent to increase the fund, out of which he may receive a dividend. He cannot therefore give any evidence to deprive the bankrupt of

(1) R. v. Prosser, 4 T. R. 19. R. v. South Lynn. 5 T. R. 667. R. v. Kirdford, 2 East, 561.

(2) Ewens v. Gold, Bull. N. P. 43.

(3) Cross v. Fox, 2 H. Bl. 279. n. (a); Flower v. Herbert, Ib. Field v. Curtis, 2 Str. 829. Chapman v. Gardner, 2 H. Bl. 279. Hoffman v. Pitt, 5 Esp. [illegible] P. C. 22.

(4) [illegible]yatt v. Wilkinson, 5 Esp. N. P. C. 18[illegible]som v. Brailey, MS. case in 1 Selw. N. P. 239.

(5) St. 5 G. 2. c. 30. § 9. Kennet v. Greenwollers, Peake, N. P. C. 3.

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his allowance (1). And the petitioning creditor is not a competent witness to prove the commission regularly sued out; because he enters into a bond to the Lord Chancellor conditioned to establish the several facts, upon which the validity of the commission depends, and to cause it to be effectually executed (2). But another creditor who has not proved his debt under the commission, is competent to support the commission, though not to increase the estate (3). There is in this case no immediate or certain benefit. It may be as advantageous for the creditor to be allowed to sue his debtor as a solvent person, as to receive a dividend under the commission.

5. In an action of trespass against a sheriff, where the question was, whether goods, which had been taken in execution in a suit against A. B., belonged to him or to the Plaintiff, A. B. was not allowed to be witness for the defendant to prove the goods his property, since he would have been discharged from his debt in case of a verdict for the defendant. (4)

6. In an action of ejectment, where the plaintiff had made out a primâ facie case against the defendant as tenant in possession, the Court of Common Pleas held that a witness called on the part of the defendant was not competent to prove himself the real tenant, and that the defendant was only his bailiff; for the verdict would have the effect of turning him out immediately; it was therefore an immediate interest, and outweighed the remoter effect of his subjecting himself by his testimony to an action of ejectment and trespass for mesne profits. (5)

If there is a direct interest in the event of the suit, it will make the witness incompetent, however small and in-

(1) Shuttleworth v. Bravo, 1 Str. 507.
(2) Green v. Jones, 2 Campb. 411.
(3) Williams v. Stevens, 2 Campb. 301.
(4) Bland v. Ansley, 2 New. Rep. 331.
(5) Doe d. Jones v. Wilde, 5 Taunt. 183.

considerable the degree of interest may be. Thus, in an action of trespass, where the question was, whether a corporation, which had inclosed part of a common, had left sufficiency for the commoners, a freeman was considered incompetent to prove the affirmative (1), because the rent must have been received for the use of the corporation; though it was admitted that the amount of the rent was exceedingly small. Hence it appears that a person who loses or gains the smallest sum by the event of a suit, whatever may be his rank, fortune, or character, is as incompetent to give evidence, as one who may be interested to the amount of thousands. This is the unavoidable consequence of the general rule. If interest is allowed to disqualify in any case, it must in all; as it is impossible by any scale to measure the different effects which it may have on different minds.

If the witness has an interest inclining him to each of the parties, so as upon the whole to make him indifferent, he will be competent to give evidence for either party. Thus in an action of assumpsit for money paid to the use of the defendants who were ship-owners, Lord Kenyon admitted the captain to prove that he had received the money from the plaintiff for the defendant's use; for he stood indifferent between the parties, and, whichever way the verdict might go, he was equally answerable (2). So in an action of covenant for rent, where the point in issue was, whether A. B., whose title both the plaintiff and defendant admitted, had demised the premises first to the

(1) Burton v. Hinde, 5 T. R. 174.*

(2) Evans v. Williams, 7 T. R. 481. n. (c). Ilderton v. Atkinson, 7 T. R. 480. Shuttleworth v. Stephens, 1 Campb. 407.

* See R. v. Mayor and Commonalty of London, 2 Lev. 231., R. v. Carpenter, 2 Show. 47., and case of City of London, 1 Ventr. 351. *contrà*. In these cases, freemen were admitted to be witnesses on account of the minuteness of their interest, against the opinion of Jones J. The law of the case in 2 Lev. (where the point is precisely the same as in the other two cases,) has been doubted by Mr. Justice Buller; see Bull. N. P. 290.

 plain-

plaintiff or to a third person, A. B. was a competent witness to prove that fact; for the verdict could not be given in evidence in any future action either by or against the witness, being a record between other parties; and it appeared to be indifferent to him, whether he had the one or the other as his tenant (1). So where one partner drew a bill in the partnership firm, and gave it in payment to a separate creditor in discharge of his own debt, the Court of King's Bench held that, in an action by such creditor against the acceptor, either of the partners might be called on the part of the defendant to prove that the partner, who drew the bill, had no authority to draw it in the name of the firm; and that the bankruptcy of the partners would not vary the question as to the competency of the witness (2). In this case, the partner who drew the bill would have been liable to the plaintiff to the amount of his debt, if the plaintiff had failed in the action, and if the plaintiff had succeeded, he would have been liable to the defendant the acceptor; and with respect to the other partner, though he would have been liable to the defendant, if the plaintiff recovered, he would have had his remedy over against his joint partner.

In the case of Ilderton v. Atkinson (3), where the question was in an action of assumpsit, whether A. B., who had received money due from the defendant to the plaintiff, received it in the character of agent for the plaintiff, the Court of King's Bench held that A. B. might be called for the defendant to prove his agency, as he was liable either to pay the money received or to refund it to the defendant; and though it was objected, that he had a stronger interest to give evidence in favour of the defendant than on the side of the plaintiff, (since, if he had received the money under a misrepresentation of his own character, the defendant might recover from him the costs of the action then depend-

(1) Bell v. Harwood, 3 T. R. 308. See Serle v. Serle, 2 Roll. Abr. 685., tit. Trial, (G,) cited Gilb. Ev. 109.

(2) Ridley v. Taylor, 13 East, 175.

(3) 7 T. R. 480.

ing as well as the money,) the Court held that the possibility of such a remote interest did not make the witness incompetent. Upon the authority of this case, the case of Birt v. Kirshaw (1) was decided; there, the Court of King's Bench were of opinion, that the indorser of a note, who had received money from the drawer to take it up, was a competent witness in an action by the indorsee against the drawer to prove on the part of the defendant, that he had satisfied the note; since he would be liable on the note to the plaintiff, if the defendant succeeded, or to the defendant in an action for money had and received, if the plaintiff succeeded; and the Court held, that the witness was not rendered incompetent by the circumstance of his being also liable to the defendant, in the latter case, for the costs of this action in consequence of his non-payment. But in the recent case of Jones v. Brooke (2), which was an action against the acceptor of a bill accepted for the accommodation of the drawer, the Court of Common Pleas held that the drawer was not a competent witness for the defendant to prove, that the holder received the bill on an usurious consideration; on the ground, that he was bound to indemnify the acceptor against the consequences of an acceptance made for his accommodation, and would therefore be liable to the acceptor not only for the principal sum but also for all the damages which he might sustain in being sued upon the bill in this action. The liability to the costs of the action, as appears from several cases before mentioned, is a substantial objection to the competency of a witness; and however indifferent he may be in other respects towards either party, yet if he has incurred such a liability, he has an immediate and direct interest in the event of the suit. In the case of Buckland v. Tankard (3) the Court held that a witness, who might have a remedy by action whether the plaintiff or defendant had a verdict, was nevertheless interested, because under the particular circumstances he would have a greater difficulty in the one case than in the other to

(1) 2 East, 458.
(2) 4 Taunt. 464.
(3) 5 T. R. 579.

enforce that remedy. However this appears to be the only case which has been decided on such a ground; and from the leading cases on this subject, which rest on the broad ground of interest, such a circumstance may now more properly be considered as having a strong influence on the witness, but not as forming any solid objection to his competency.

The objection to a witness on account of his being interested is an objection on the voire dire, and excludes him from giving any kind of evidence for the party who calls him. If the objection prevails, he cannot be examined at all. The meaning of the rule, which declares that an interested person shall not be witness in courts of justice, must be that he cannot be heard *at all* as a witness on the side to which his interest inclines him. Chief Baron Gilbert lays it down, that he is *totally* excluded from all attestation, from his supposed want of integrity. Thus on an indictment against a township for not repairing a highway, a parishioner seems not to be a competent witness for the prosecution, even to prove the road to be a common highway; though it may be said, that to such an extent he charges himself, and his testimony is against his own interest. The answer to this is, that *on the trial of this indictment* his evidence has not that tendency; for without the proof of that fact the indictment cannot be sustained, and the witness by giving such evidence is supporting a prosecution, which, if it succeed, would have the effect of discharging him and the rest of the parishioners. So in an action of ejectment, a witness, who admits that he is to have a lease of the premises, in case the defendant is turned out of possession by the ejectment, is as incompetent to prove the defendant in possession of the premises, as to prove any other material fact necessary for the support of the action.

SECT.

Sect. II.

Of the Rule on the Subject of Interest, considered with reference to the Parties in the Suit.

A party to the suit on record cannot be witness at the trial for himself or for a joint-suitor against the adverse party (1), on account of the immediate and direct interest, which he has in the event, either from having a certain benefit or loss, or from being liable to costs. The party, therefore, in whose name an action is brought, cannot be a witness, though he be merely trustee for some other person (2); as a prochein amy suing for an infant (3). Persons appointed governors and directors of the poor of a parish under an act of parliament, which authorizes them to assess rates on the inhabitants, but in case of appeal makes them liable to costs, to be indemnified out of the parochial fund, are not competent witnesses on the trial of such appeal; as they are liable to costs individually in the first instance (4). But there is no objection, it is said, to the competency of persons, who are party to a suit in a corporate capacity, and consequently not individually liable to costs, and who are free from all interest in the question. Thus, in an action against the governors of the Foundling Hospital for the amount of work done by the plaintiff, Lord Kenyon admitted several of the governors to prove the badness and insufficiency of the work. (5)

An exception to the general rule is stated by Rolle C. J., in the case of an action against a hundred on the statute of Winton (6), where the plaintiff (the party robbed) may

(1) 1 Vern. 230. 1 P. Wms. 596. Gilb. Ev. 116.

(2) Bauerman v. Radenius, 7 T. R. 668.

(3) Clutterbuck v. Lord Huntingtower, 1 Str. 505. James v. Hatfield, 1 Str. 548. Hopkins v. Neal, 2 Str. 1025. Gilb. Ev. 107.

(4) R. v. St. Mary Magdalen, Bermondsey, 3 East, 7.

(5) Weller v. The Governors of Foundl. Hosp. Peake's N. P. C. 153. And see Barrett v. Gore and another, 3 Atk. 401.

(6) St. 13 Ed. 1. c. 1.

prove

prove the robbery and the amount of his loss, "from necessity, on default of other proof (1)." And in the case of Bennet v. Hundred of Hertford (2), which was an action on the same statute, brought by a carrier for a robbery committed in his absence on his servant, the Court ruled, against the opinion of Rolle C. J., that the plaintiff might prove the amount of the money which he had delivered to his servant. The 15th section of the statute 8 G. 2. c. 16. recites, that in an action against the hundred the person robbed may prove the robbery and the property of which he was robbed. But though the plaintiff may prove the fact of the robbery, yet with respect to matters, which may be proved by other evidence, he is not a competent witness. Thus he cannot give evidence to prove, that the place, where he was robbed, is within the hundred against which he has brought the action (3). And though the party robbed, who brought the action, has been allowed to be witness even in his own cause, yet none of the inhabitants of the hundred were formerly received on behalf of the hundred, however inconsiderable their interest might be (4). But now they are competent witnesses by the statute 8 G. 2. c. 16. s. 15.

One other exception appears to be made in the case of an action for a malicious prosecution, where it seems to have been understood, that the evidence, which the defendant himself gave on the trial of the indictment, may under certain circumstances be received in his favour on the trial of the action. In the case of Johnson v. Browning (5), Lord Holt C. J. admitted in evidence the oath of the defendant's wife (who was the only person present at the time of the supposed felony, and who, as the report says, could not herself be witness,) to prove the felony

(1) 2 Roll. Ab. 636. Bull. N. P. 289.

(2) 2 Roll. Ab. 686. Vin. Ab. Ev. T), pl. 34.

(3) Per Page J. Rep. temp. Hard. 83.

(4) Per Cur in R. v. Carpenter, 2 Show. 47.

(5) 6 Mod. Rep. 216.

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committed; "for otherwise, it is said, one that should be robbed would be under an intolerable mischief; if he prosecuted for such robbery and the party should be acquitted, the prosecutor would be liable to an action for a malicious prosecution without the possibility of making a good defence, though the cause of prosecution were ever so pregnant." And Mr. Justice Buller, treating of this action, says (1), "as it may come to be left to a jury, it is advisable for the defendant to give proof of a probable cause, if he be capable of doing it; and for this purpose proof of the evidence given by the defendant on the indictment is good."

In the case of the Mayor and Commonalty of London (2), and that of the city of London concerning water-bailage (3), the point in issue was, whether the corporation was entitled to certain tolls; in the first case it was ruled by the whole Court, and by three judges in the last, that freemen (members of the corporation) might be witnesses in support of the claim, because the tolls would be received for the benefit of the whole corporate body, and the interest of any individual must therefore be inconsiderable. But Mr. Justice Buller has doubted the law of the former case (4), and its authority is still further shaken by the case of Burton v. Hinde (5), before mentioned.

Freemen are sometimes admitted as witnesses from necessity, when they would otherwise be objectionable. A case of this kind is mentioned by Mr. Justice Buller (6). "The question being, whether the defendants had a right to be freemen, an alderman was permitted to prove that they were not freemen, because none but aldermen were privy to the transactions of the corporation in making per-

(1) Bull. N. P. 14., citing Cobb. v. Car. 1746.
(2) 2 Lev. 231.
(3) 1 Ventr. 351.
(4) Bull. N. P. 290.
(5) 5 T. R. 174. See ante, p. 52.
(6) R. v. Phipps & Archer, Bull. N. P. 289. and see ante p. 40.

sons

sons free; although it appeared that there were commons belonging to the freemen."

In courts of equity, if a bill is filed for discovery only, and an issue is directed, the plaintiff goes to law, giving the defendant the benefit of his answer (1). And it seems at one time to have been the practice to direct an issue, where a bill was filed for *relief*, and the defendant's answer positively denied the facts stated in the bill, which was supported only by a single witness; and in such cases the defendant's answer was directed to be read at the trial (2). But an issue would not now be directed, where there is merely oath against oath, for the rule in equity is, that if the answer contains a positive denial of the case stated in the bill, and it is contradicted only by a single witness, there cannot be a decree against the defendant (3); it should seem, therefore, that in such a case the answer of the defendant cannot be directed to be read at law. And the Court has refused to make an order to that effect, where the plaintiff's witness was supported by concurring circumstances. (4)

As a party to the suit is not suffered to be witness in support of his own interest, so he is never compelled in courts of law to give evidence for the opposite party against himself. Thus, in a question of settlement between two parishes, the rated inhabitants of either parish, being in reality the parties to the proceeding, cannot be compelled by the adverse party to answer against their own interest (5); and their declarations are evidence against themselves (6). But where one of several co-plaintiffs comes forward voluntarily to disprove the defendant's liability to the demand made upon him, he may be admitted with the consent of the

(1) See 9 Ves. 282.

(2) Ibbotson v. Rhodes, 2 Vern. 554. 3 Atk. 408. Gilb. Ev. 137.

(3) See infrà, Ch. VII. Sect. I.

(4) Only v. Walker, 3 Atk. 407.

(5) R. v. Woburn, 10 East, 403. Fenn dem. Pewtriss and another v. Granger, 3 Campb N. P. C. 177.

(6) R. v. Hardwick, 11 East, 579. R. v. Whitley Lower, 1 Maule & Sel. 636.

adverse

adverse party, though at the same time he defeats the claim of those who jointly sue with him (1). For, if the plaintiff were to make a declaration against his interest out of court, evidence of that declaration would be admissible; and how is the proof less credible, if, with the consent of the defendant, who waives all objection to his testimony, he declares the same thing upon oath at the time of the trial?

A defendant cannot regularly be witness for co-defendants: but, if no evidence has been produced against him, he is entitled to his discharge, as soon as the opposite party has closed his case, and may then give evidence for the others (2). If this were not allowed, great injustice might be done by including witnesses in the process, for the purpose of supporting a false charge. But if there is any even the slightest evidence against him, he cannot be discharged before the rest, and the case must go altogether to the jury (3). So, in trespass against a person, "for that he, together with A. B., &c.," committed the wrong complained of, if it appears that A. B. was concerned in the trespass, and that process was sued out against him, and an endeavour made to arrest him, or that the process was lost, he cannot be admitted a witness for the defendant (4): but if nothing is proved against A. B. then he ought to be admitted (5). The following case is put by Ch. Baron Gilbert: "Trespass against A. and B. for two horses — evidence against A. as to one — and the question is, if he may be a witness for B. in relation to the other; and it seems, that if it were the same fact, and the trespass committed at the same time and place, he may not be a witness, because he swears to discharge himself; but if it were not the same fact, but two distinct trespasses at different times and

(1) Norden and another, v. Williamson, 1 Taunt. 378.

(2) Case of Dymoke and others, Sav. 34. pl. 81. R. v. Bedder and others, 1 Sid. 237. Hawk. b. 2. c. 46. s. 98. Gilb. Ev. 117. Bull. N. P. 285. Case of the Mutineers of the Bounty, cited 1 East, 312

(3) Bull. N. P. 285. Gilb. Ev. 117. Raven and another v. Dunning and another, 3 Esp. N. P. C. 25.

(4) Reazon v. Ewbank, Bull. N. P. 286. Hill v. Fleming, Rep. temp. Hard. 264. Lloyd v. Williams, Ib. 123.

(5) Page v. Crook, Styl. 401. 1 Atk. 452.

places,

places, arbitrarily joined in the same declaration, then they may be witnesses one for the other, because the oath of one of them has no influence on the fact laid to his charge, but merely goes in discharge of the other." (1)

In a case where one of the defendants on an indictment for an assault submitted and was fined, and paid the fine, Pratt C. J. allowed him to be witness for another defendant, considering the trial as at an end with respect to him (2). But on a joint indictment against several for a misdemeanor, a defendant, who suffers judgment by default, cannot be a witness either for the others (3) or against them (4). And in an action on a joint contract against two defendants, where one let judgment go by default, Lord Kenyon refused to admit him as witness for the other defendant to negative the contract; for, if negatived as to one, it fails as to the other, and the plaintiff could not make use of the judgment by default against him (5); nor is he a competent witness for the plaintiff, for, if the plaintiff succeeds, he will be entitled to a contribution from the co-defendant, and if the plaintiff fails, he himself will be liable to the whole of the demand (6). It has been held at nisi prius, that a defendant in an action of trover, who suffers judgment by default, may be witness for the co-defendants, as he is not liable to the costs of the issue tried against the other, and is not himself released whatever may be the event of that issue (7). If a material witness for a defendant in ejectment is made a co-defendant, his proper course is to let judgment go by default; but if he plead, the Court will not afterwards upon motion strike out his name (8). "But in such case," says Mr. Justice Buller, "if he consent to let a verdict be given against him for so much as he is proved to be in possession

(1) Gilb. Ev. 118.

(2) R. v. Fletcher, 1 Str. 633.

(3) R. v. Lafone and others, 5 Esp. N. P. C. 155.

(4) Bull. N. P. 285. Chapman v. Graves, 2 Campb. N. P. C. 333. n.

(5) Brown v. Fox, Exr. Sum. Ass. 1789, MS.

(6) Brown v. Brown and another, 4 Taunt. 752.

(7) Ward v. Haydon and another, 2 Esp N. P. C. 553. See 2 Campb. N. P. C. 334.

(8) Dormer v. Fortescue, Bull. N. P. 285.

session of, I see no reason why he should not be a witness for another defendant." (1)

Though a plaintiff cannot ordinarily examine a defendant as a witness in actions of common law, though nothing be proved against him, (because he is considered as having waived his testimony by making him a defendant,) yet the rule is much less strict in courts of equity, where defendants, who are made parties to a suit without having any interest, are allowed to be examined either for the plaintiff, or for their co-defendants (2). Where a witness for the plaintiff is by mistake made a defendant, the court will on motion suffer his name to be struck out of the record even after issue joined, and then he may be examined (3): or, in the case of an information, the attorney-general may enter a *nolle prosequi* as to one of the defendants, and so make him a witness. (4)

Sect. III.

Of the Rule on the Subject of Interest, considered with reference to the Husband or Wife of the Party.

As a party on record is not a competent witness, so neither is the husband or wife of the party competent to give evidence either for or against the party (5). No other relation is excluded (6); a father may give evidence for his son, or the son for his father, and though the relation between them may influence his testimony, it will not render him incompetent. The reason for excluding husband and wife from giving evidence, either for or against each other, is founded partly on their identity of interest, partly on a

(1) Bull. N. P. 28.
(2) Barrett v. Gore and another, 3 Atk. 401. Ambl. 393. 2 Chan. Cas. 214. 1 Ball and Beatty, 99.
(3) 1 Sid. 441. Bull. N P. 285.
(4) Rep. temp. Hard 163.
(5) Co. Lit. 6. b. Hawk. b. 2. c. 46. s. 70. Gilb. Ev. 119. Bull. N. P. 286.
(6) 1 Hale, P. C. 303. 2 Hale, P. C. 276. Hawk. b. 2. c. 46 s. 76. Bull. N. P. 287. 1 Wils. 332.

principle

principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice. They cannot be witnesses *for* each other, because their interests are absolutely the same; they are not witnesses *against* each other, because it is contrary to the legal policy of marriage. It has been resolved, says Lord Coke (1), that a wife cannot be produced against the husband, as it might be the means of implacable discord and dissention between them, and the means of great inconvenience. Thus, in an action brought by a woman as feme sole, the defendant cannot call the plaintiff's husband to prove her married, thereby to nonsuit her (2). So where an action is brought by or against the husband, or by the husband and wife jointly in right of the wife, the declarations of the wife are not evidence against him (3). Therefore, in an action of assumpsit brought by the husband for wages earned by his wife, her acknowledgment of having been paid by the defendant is not to be admitted against the husband (4). So in an action of trespass against a husband and wife, the wife's confession of a trespass, committed by her, cannot be given in evidence to affect the husband. (5)

In an action for criminal conversation with the plaintiff's wife, the wife's letters to the defendant are not evidence for the defendant against the husband, nor is her confession evidence for the husband against the defendant; but conversations between her and the defendant are evidence against him (6). Evidence of the manner in which the husband and wife used to live together, before her connection with the defendant, is clearly admissible, for the purpose either of increasing or lowering the damages; and in a case where they necessarily lived apart, being servants in different

(1) Co. Lit. 6. b.

(2) Bentley v. Cook, cited in R. v. Cliviger, 2 T. R. 265. 269.

(3) Winsmore v. Greenbank, Willes, 577. Alban and others v. Pritchett, 6 T. R. 680. Baker v. Morley, Bull. N. P. 28.

(4) Hall v. Hill, 2 Str. 1094.

(5) Per Cur. in Denn v. White and another, 7 T. R. 112.

(6) Bull. N. P. 28. Winsmore v. Greenbank, Willes, 577.

families,

families (1), Lord Kenyon held that the letters of the wife to her husband, which had been written before any suspicion of a criminal intercourse, were evidence to shew the affection which subsisted between them; but, on account of the obvious danger of collusion, it ought to be strictly proved, that the letters, which are offered in evidence, were written at a time, when the wife was not suspected of misconduct.

In an action brought by a trustee to a marriage-settlement against a sheriff, to recover back the value of certain goods sold by him under an execution against a third person, that person was not admitted to prove, on the part of the plaintiff, that the goods had been conveyed in trust for the separate use of his (the witness's) wife (2). In this case, as his debt would have been discharged by a sufficient execution, his evidence would have been in that respect against his personal interest (3): but, on the other hand, it was the wife's interest to have the property secured for her separate use; and though the action was between third persons, yet it directly affected her interest, the point in issue being, whether the goods belonged to her or to her husband.

In an action of trover by a carrier for a box, which had been delivered to the defendant by mistake, the plaintiff called the owner's wife to prove what the box contained, but Holt C. J. refused to hear her testimony, on the ground that the verdict in that action, with oath of what the carrier's witness swore, might be given in evidence to prove the value of the goods in a subsequent action brought by the husband against the carrier (4). And on a prosecution against several persons for a conspiracy, Lord Ellenborough C. J. refused to admit the wife of one of the defend-

(1) Edwards v. Crock, 4 Esp. N. P. C. 39.

(2) Davis v. Dinwoody, 4 T. R. 678.

(3) Bland v. Ansley, 2 New Rep. 331.

(4) Tiley v. Cowling, Ld. Raym. 744. Bull. N. P. 243. But see post, Part 2. Ch. 2. Sect. 1.

 ants

ants to be a witness for the others: a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband. (1)

This rule of evidence, which has been adopted for the purpose of promoting a perfect union of interests and of securing mutual confidence, is so strictly observed, that even after a dissolution of marriage for adultery the wife is not admitted to give any evidence, which would have been excluded if the marriage had continued (2). Thus one great cause of distrust is removed, by making the confidence, which once subsists, ever afterwards inviolable in courts of law. In a case (3) before Lord Hardwicke C. J., he would not suffer a woman to be a witness, though her husband consented. "The rule, he said, is for the peace of families, and such consent should never be encouraged."

The husband and wife are not allowed to give any evidence, that may directly criminate (4), or even tend to criminate each other (5). Thus, where an actual marriage has been proved between two persons, a woman cannot be suffered to prove an antecedent marriage between herself and one of the parties (6), the consequence of which might be a prosecution for bigamy: and it has been laid down by one learned judge, that if a witness has been examined to a material fact in a cause, which from its nature must have been known to him, (as, for example, to his own marriage,) his wife cannot be called by the same party to contradict him (6), as such evidence might lead to a charge of perjury, and cause the husband to be apprehended.

(1) R. v. Locker and others, 5 Esp. C. 107; and see R. v Frederick and another, 2 Str. 1094. S. P.

(2) Monroe v. Twisleton, cited in Aveson v. Lord Kinnaird, 6 East, 192.

(3) Barker v. Sir Woolston Dixie, Rep. Temp. Hard. 264.

(4) Mary Grigg's case, Sir T. Raym. 1.

(5) 1 H. P C. 301. Broughton v Harpur cor. Holt C. J. 2 Lord Raym. 752. R. v. Cliviger, 2 T. R. 263.

(6) R. v. Cliviger, 2 T. R. 263, by Ashurst J Mr. Justice Grose (the only other judge in Court) did not mention this as the ground of his judgment, nor did he notice that part of the case.

The

The case of the king against the inhabitants of Cliviger, which supports the two last positions, was shortly this. On an appeal against an order of removal of a pauper and also of a woman as his wife, the respondents having proved the marriage, the appellants called the man for the purpose of proving a former marriage with another woman, but he swore directly the reverse; they then called that woman, to prove the alleged former marriage. The Court of Quarter Sessions rejected the witness; and the Court of King's Bench determined that she was not competent, for the reasons which have been mentioned. This case does not go so far as to decide, that where a witness proves a fact on one side, the *adverse* party shall be precluded from calling the husband or wife of the witness to disprove that fact. And as the most serious inconveniencies might result from the adoption of such an exclusive rule, which would be a bar to the full and complete investigation of the subject, (even in cases, too, where the property, the character, or even the life of the party may be at stake,) it may perhaps be safely laid down, that such contradictory evidence would be admitted. And many cases might be supposed, in which it would be extremely desirable, and perhaps necessary to public justice, that the *same* party, who calls the husband as witness, should afterwards be allowed to prove by the evidence of his wife, that the fact is different from what he has stated; for although they may directly contradict each other as to a particular fact, it will not follow that either party has been guilty of perjury.

There are several exceptions, to which the reason of the general rule on this subject does not apply, or where it is outweighed by considerations of higher importance.

First, if a woman is taken away by force and married, she may be witness against her husband indicted on st. 3 H. 7. c. 2., for she is not a wife *de jure*, a contract obtained by force having no obligation in law (1). From this — Exceptions.

(1) Swendsen's case, 5 St. Tr. cited Rep. Temp. Hard. 83. 1 Hale 456. Bull. N. P. 286. Ramsay's case, P. C. 302. 661.

this it should seem, that if the actual marriage is valid, (as where the woman after the abduction consents to the marriage voluntarily, and not induced by any precedent menace,) her evidence ought not to be allowed. (1)

Secondly, on an indictment for a second marriage during the continuance of a former marriage, though the first wife cannot be a witness (2), yet the second wife may after proof of the first marriage. (3)

Thirdly, a wife may be witness on the prosecution of her husband for an offence committed against her person (4). This was determined by all the judges present on Lord Audley's trial: and has been since confirmed by the greatest authorities (5), on every principle of humanity and justice. So in Azyre's case, on an indictment for beating his wife, Lord Raymond suffered her to give evidence (6). A wife is permitted to exhibit articles of the peace against her husband (7); and the Court will not receive affidavits on the part of the defendant, to contradict the truth of the articles exhibited against him, and prevent his giving surety (8). So, an affidavit of a married woman has been admitted to be read, on an application to the Court of King's Bench for an information against her husband, for an attempt to take her away by force after articles of separation (9): and it would be strange, says Mr. Justice Buller, to permit her to be a witness to ground a prosecution, and not afterwards to be a witness at the trial (10). On the trial of a man for the murder of his wife, her dying declarations are evidence against him (11). It has been said indeed, that a wife may

(1) Acc. 1 Hale P. C. 302. 4 Bl. Com. 209, contra.

(2) Mary Grigg's case, Sir T. Raym. 1. Hawk. b. 2. c. 46. s. 71.

(3) 1 Hale P. C. 393. Bull. N. P. 287. 1 East, P. C. 469.

(4) 1 St. Tr. 393. Hutton, 116.

(5) 1 Hale P. C. 301. Hawk. b. 2. c. 46. s. 77. Probyn J. in Rep. Temp. Hard 83. Bull. N. P. 287. 1 Bl. Comm. 443. Doubted in Grigg's case, Sir T. Raym. 1, and in Gilb. Ev. 120.

(6) 1 Str. 633; Bull. N. P. 287. S. C. Jagger's case, 1 East, P.C. 454.

(7) Bull. N. P. ib.

(8) Lord Vane's case, 2 Str. 1202. more fully stated from Mr. Ford's MS. in 13 East, 171. n. (a); R. v. Doherty, Ib. S. P.

(9) Lady Lawley's case, Bull. N. P. 287. Mary Mead's case, 1 Burr. 543.

(10) Bull. N. P. 287.

(11) Woodcock's case, 2 Leach Cr. C. 563. John's case, 1 East, P. C. 357.

be

be witness against her husband in case of high treason (1); but there are authorities the other way. (2)

Fourthly, where the wife has made contracts with the authority and consent of the husband, she has been considered his agent for that purpose, and her representations are evidence against the husband, who has permitted her to contract for him with third persons, on the same footing as the representations of any other agent (3). Thus, in an action of assumpsit by a servant for wages, the plaintiff was allowed to give in evidence a deed executed by the wife of the defendant at the time of the hiring, which, though void as a deed, was admitted in order to shew the terms of the contract. (4) *

Fifthly, Commissioners of bankrupt could not at common law examine the bankrupt's wife (5). But now by st. 21 J. 1. c. 19. s. 5 & 6., which recites, that doubts had arisen upon the point, it is provided, "that, after the party is declared a bankrupt, the commissioners may examine his wife on oath, for the finding out of the estate, goods, and chattels of such bankrupt, concealed, kept, or disposed of by such wife, in her own person, or by her act or means, or by any other person."

Sixthly, upon an appeal against an order of bastardy in the case of a married woman, Lord Hardwicke and the

(1) Dictum, in Grigg's case. Sir T. Raym. 1. cited in Gilb. Ev. 119. and Bull. N. P. 289.
(2) Brownlow 47.
(3) Emerson v. Blonden, 1 Esp. N.P. C 142. Palethorp v. Furnish, 2 E p. N. P. C. 511. n. Gregory v. Parker, 1 Camp. N. P. C. 394. See 15 Ves. 159.
(4) White v. Cuyler, 6 T. R. 176.
(5) Anon. 1 Brownlow 47.

* In an anonymous case reported in 1 Strange, 527, where an action was brought for nursing the defendant's child, Pratt C. J. admitted evidence on the part of the plaintiff, that the defendant's wife had represented her agreement with him to be for so much per week; because such matters, he said, are usually entrusted to the women. Bull. N. P. 287. S. C. But it has been since determined, that the declarations of the wife are not admissible against the husband, in an action brought by him in right of his wife. Alban and Wife v. Pritchett, 6 T. R. 680.

other Judges held, that she was a competent witness to prove her criminal connection with the appellant, though her husband was interested both in the question and in the event of the cause, because such a fact so secret in its nature can scarce ever be proved by other evidence (1). But this is only from the necessity of the thing: she is not competent to prove any other fact, as want of access (2), which other witnesses may be reasonably supposed capable of proving. To admit such evidence would be giving the wife a power to bastardize her child, and to discharge the husband from the burthen of its maintenance.

On an appeal against the removal of a woman as the widow of A. B. deceased, primâ facie evidence of the marriage having been produced on the part of the respondents, the Court of King's Bench determined, that the woman was a competent witness, on the part of the appellants, to *disprove* the marriage. (3)

In the case of Campbell v. Twemlow (4), which lately came before the Court of Exchequer on a motion to set aside an award, one of the grounds of the application was, that the arbitrator had rejected the evidence of a woman called on the part of the plaintiff, who had cohabited with him for several years and passed as his wife, but who would have stated, that she had never been married to him. The point was much argued at the bar. The Court, considering it a doubtful question, (as the report states,) declined giving any opinion, as it was unnecessary for the determination of the case; and they refused the motion, on the ground, that the opinion of the arbitrator was final and conclusive, all matters both of law and fact having been left to his decision. Mr. Baron Richards cited a case, before Lord Kenyon on the Chester circuit in the year 1782, where on a trial for

(1) R. v. Reading, Rep. Temp. Hard. 82. R. v. Bedell, Andr. 8. R. v. Luffe, 8 East, 203. Gilb. Ev. 139.

(2) Ante (1), R. v. Rooke, 1 Wils. 340. R. v. Kea, 11 East, 132.

(3) R. v. Bramley, 6 T. R. 330; R. v. St. Peter's, Burr. Set. Cas. 25. S. P.

(4) 1 Price, 81.

forgery the prisoner called a woman as his witness, whom he had himself in Court represented to be his wife, but afterwards, on hearing an objection taken to her competency, denied that she was married to him, and Lord Kenyon refused to admit her evidence.

Seventhly, it has been ruled at nisi prius, that a wife may be witness, in an action between third persons not immediately affecting the interest of the husband, though her evidence may possibly expose him to a legal demand; as, in an action between third persons for goods sold and delivered, to prove the goods sold not on the credit of the defendant, but on her husband's credit (1). This evidence, it may be said, was in some measure against the husband, though he was not a party in the suit. On the other hand, to reject her evidence in such a case would be a hardship on the defendant, who may have no other means of defending himself against an unjust demand: and though upon her testimony the defendant may have a verdict, and an action may afterwards in consequence be brought against the husband, she would not then be admitted as witness, nor could her evidence in the first suit be produced against him.

Sect. IV.

Of the Effect of Admissions by a Party to the Suit, or by his Agent, against the Party's Interest.

As the parties to a suit are excluded from being witnesses on account of their interest, statements or representations made by them against their interest must be evidence against them, and in many cases they will be the strongest evidence. Upon this principle the free admissions of one of the parties to a suit on the matter in issue, and the voluntary confession of a prisoner under a criminal charge, are always received in evidence against the party.

(1) Williams v. Johnson, by King C. J., 1 Str. 504. Bull. N. P. 287. S. C.

 First,

First, with respect to admissions;

The admissions of a party to the suit against his interest are evidence in favour of the other side, whether made by the real party on record, or by a nominal party who sues as a trustee for the benefit of another (1), or whether by the party who is really interested in the suit though not named on the record (2). Thus, in an action of debt upon a bond conditioned to pay money to L. D., for whose benefit the action was brought, the defendant proved, that L. D. had said in a conversation about this bond, that the defendant owed nothing, upon which the jury found for the defendant: on a motion for a new trial, it was argued that the declarations of L. D., who was no party to the action, ought not to affect the plaintiff, and affidavits were offered to explain L. D.'s evidence; but the court said, that the affidavits were inadmissible, and that it was to be considered as if L. D. was the plaintiff, the action being for L.D.'s benefit (3). And in an appeal against the removal of a pauper, declarations by a rated inhabitant of either parish, concerning the facts in issue, are admissible in evidence, not only against himself, but also against the other rated inhabitants of his parish (4): for they are the parties really interested, although the appeal may be entered in the names of the parish officers; and they are not compellable as parties to give evidence of the fact. (5)

It may be inferred from a former part of this section, that in a civil suit against several persons, who are proved to have a joint interest in the decision, a declaration made by one of those persons, concerning a material fact within his knowledge, is evidence against him, and against all who are parties with him to the suit (6). In an action of covenant therefore against two defendants, the affidavit of one of

(1) Bauerman v. Radenius, 7 T. R. 664.
(2) R. v. Hardwick, 11 East, 578. 589.
(3) Hanson v. Parker, 1 Wils. 257. Smith v. Lyon, 3 Campb. N. P. C. 465.
(4) R. v. Hardwick, 11 East, 578.
(5) 11 East, 589. R. v. Woburn, 10 East, 395.
(6) 11 East, 589.

them

them may be given in evidence against both (1). So, in an action by several partners against the defendant for the non-performance of an agreement, a declaration by one of the partners, that the goods, to which the agreement related, were his separate property, is evidence against all the plaintiffs suing as upon a joint contract (2). The rule has even been extended in actions so far, as to admit the declarations of one partner to be evidence against another, concerning joint contracts and their joint interest, although the person, who makes such declarations, is not a party to the suit: as where, in an action by a creditor against some of the partnership firm, the answer of another partner to a bill filed by other creditors was received in evidence against the defendants, not indeed to prove the partnership, but, that being established, as an admission against those, who are as one person with him in interest (3). And the admission of a partner, though not a party to the suit, is evidence as to joint contracts against any other partner, as well after the determination of the partnership as during its continuance. (4)

This is the rule respecting admissions in the case of joint contracts, or where several persons have one and the same interest in the subject matter. But the same rule cannot be applied to actions of trespass or to criminal proceedings. In an action of trespass against several defendants, an admission by one of the defendants is not evidence against the others to prove the fact of their being co-trespassers, and, even where that fact is fully established, it seems very doubtful, whether any admissions or declarations made by one of the defendants, as to the joint motives or designs of the party, can be received as evidence against the others, except so far as they accompany the act, and may be con-

(1) Vicary's case, Gilb. Ev. 51.

(2) Lucas and others v. De la Cour, 1 Maule & Sel. 249.

(3) Grant v. Jackson, Peake, N. P. C. 203. Wood and others v. Braddick, 1 Taunt. 104. And see Whitcomb v. Whiting, 2 Doug. 652. Jackson v. Fairbank, 2 H. Bl. 340. Thwaites v. Richardson, Peake, N. P. C. 16.

(4) Wood and others v. Braddick, 1 Taunt. 104.

sidered

sidered as forming a part of the res gesta. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of the law the act of the whole party (1), and therefore the proof of such act by eye-witnesses would be evidence against any of the others, who were engaged in the same conspiracy; and further, any declarations made by one of the party at the time of doing such illegal act seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible, as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be admitted as evidence to affect them on their trial for the same offence. It has been solemnly decided, as will be shewn in treating of the admissibility of confessions, that a confession is evidence only against the person himself who confesses, not against other persons, although they may have been proved to be his accomplices.

The statement of an agent.

The statement or representation of an agent in making an agreement, or in doing an act within the scope of his authority, is evidence against the principal himself, and equivalent to his own acknowledgement (2): for what the agent says may be explanatory of the agreement, or determine the quality of the act which it accompanies, and must therefore be as binding on the principal as the act or agreement itself. To prove such a representation, the opposite party is not obliged to call the agent, but may establish it by other evidence. Thus, what an agent says at the time of a sale, which he is employed to make, is evidence as part of the transaction of selling. But the principal is not

(1) R. v. Stone, 6 T. R. 527.

(2) See the judgment by the Master of the Rolls in Fairlie v. Hastings, 10 Ves. 127.

bound

bound by a representation of the agent at another time (1). So it should seem, if a person buys goods, and directs the vendor to deliver them to an agent employed by him to receive them, the purchaser would be bound by the receipt of his agent given at the time of delivery; but not by any subsequent acknowledgement. In the case of Biggs v. Laurence (2), which was an action for goods sold and delivered, Mr. Justice Buller admitted a written paper, by which the defendant's agent acknowledged the receipt of the goods, as evidence against the principal; and on that evidence the plaintiff recovered. However, it was on one occasion (3) stated by counsel in argument, that Lord Kenyon since that case had frequently ruled the contrary, without its ever having been questioned; and this statement seems to have been acquiesced in by Lord Kenyon (4), who said, "that was not the point, upon which the case was afterwards argued or determined, on the motion for a new trial," meaning the point, that such a receipt could be admitted in evidence. It does not appear, from the case of Biggs v. Laurence, whether the agent's acknowledgement, of having received the goods, was made at the time of delivery, or on what other occasion: though, upon this fact, according to the cases above cited, particularly the case of Fairlie v. Hastings, in which the subject was fully discussed by the Master of the Rolls, the admissibility of such evidence may be found materially to depend. In one case indeed (5), Lord Kenyon C. J. is said to have refused to admit an agent's letter as evidence of an agreement against the principal, holding, that the agent himself ought to be examined. "If the agreement," (said the Master of the Rolls (6), adverting to this case,) "was contained in the letter, I should have thought it sufficient, to prove that the letter was written by the agent: but, if the letter was offered as

(1) Helyar v. Hawke, 5 Esp. N. P. C. 74. Peto v. Hague, 5 Esp. N. P. C. 135. Alexander v. Gibson, 2 Camp. 555. Palethorp v. Furnish, 2 Esp. N. P. C. 511. n.

(2) 3 T.R. 454.

(3) Beaurman v. Radenius, 7 T. R. 665.

(4) See 10 Ves. 128.

(5) Maesters v. Abraham, 1 Esp. N. P. C. 375.

(6) 10 Ves. 127.

proof

proof of the contents of a *pre-existing* agreement, then it was properly rejected." And the Court of Common Pleas lately decided after much argument, in the cases of Kahl v. Jansen (1), and Langhorn v. Allnutt (2), that the letters of an agent abroad to his principal, containing a narrative of the transaction in which he had been employed, were not admissible in evidence against the principal, as the mere representation of the agent. The general rule on the subject was there fully recognized and confirmed. "When it is proved, said the Chief Justice, that A. is agent of B., whatever A. does, or says, or writes, *in the making of a contract* as agent of B., is admissible in evidence, because it is *part of the contract*, which he makes for B., and which therefore binds him, but it is not admissible *as the agent's account* of what passes (3)." Such declarations are admitted in evidence, not for the purpose of establishing the truth of the fact stated, but as representations by which the principal is as much bound as if he made them himself, and which are equally binding, whether the fact stated be true or false.

From analogy to the preceding case of agent and principal, what a sheriff's officer has said at the time of the execution of a writ, or concerning his custody of a debtor taken in execution, will be admissible in evidence against the sheriff himself in an action against him for an escape, as *part of the transaction* in which he represents the defendant, and for which the defendant is responsible (4). The declaration of an under sheriff is not evidence against his principal, excepting so far as it constitutes a *part of the res gesta;* and though the rule seems to have been laid down in larger and more general terms in the case of Yabsley and Doble, it has been so restricted by several later authorities.

(1) 4 Taunt. 565.
(2) 4 Taunt. 511. and Reyner v. Pearson, 4 Taunt. 663. S. P.
(3) 4 Taunt. 519.
(4) Bowsher v. Cally, Sher. of Wilts. 1 Campb. N. P. C. 391, n. North v. Miles, Sher. of Mid. id. 389. Yabsley v. Doble, 1 Ld. Ray. 190. Kempland v. Macaulay, Peake, N. P. C. 65.

On

On the same principle, if one party refers another, for information on a disputed fact, to a third person as authorized to answer for him (1), or employs an agent to make certain propositions respecting a transaction between himself and another (2), he is bound by what his agent says, or does, within the scope of his authority, as much as if it had been done, or said, by himself. Thus, for example, in an action for goods sold and delivered, where it appeared at the trial, that, in a conversation between the plaintiff and defendant, the former asserted that he had delivered the goods by one C., and the defendant replied, "If C. will say he did deliver the goods, I will pay for them," the plaintiff was allowed to give in evidence C.'s answer respecting the matter referred to him (3). In the case of Fabrigas v. Mostyn, a point arose, which may serve as another example to illustrate the rule here laid down. A witness, who had been employed by the defendant, to convey certain proposals to the plaintiff, explained them to him by an interpreter, from whom also he received the answer (4): the question was, whether the words of the interpreter could be given in evidence by the witness, as the answer of the plaintiff; or whether the interpreter himself ought to be called, as the witness understood neither the questions put to the plaintiff, nor the answer made by him. But Mr. Justice Gould ruled that the evidence of the witness was clearly admissible, and sufficient. Here the interpreter was the accredited agent of the parties, acting within the scope of his authority, and in the execution of his agency.

It must be remembered, that the cases, in which the declarations of an agent have been admitted against the principal, are exceptions to that general rule, which requires evidence to be given upon oath: and the exception is con-

(1) Daniell v. Pitt, 1 Campb. N. P. C. 366.

(2) Gainsford v. Grammar, 2 Campb. N. P. C. 9.

(3) Daniell v. Pitt, 1 Campb. N. P. C. 366; 6 Esp. N. P. C. 74, S. C. Williams v. Innes, 1 Campb. N. P. C. 364. Brook v. Kent, do. n. 366. Burt v. Palmer, 5 Esp. N. P. C. 145.

(4) 11 St. Tr. 171.

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fined to such statements, as are made by him, either at the time of his making an agreement about which he is employed, or in acting within the scope of his authority. "Except in one or other of these ways, (said the Master of the Rolls in Fairlie v. Hastings (1),) I do not see how they can be evidence against the principal:" and therefore in that case, (where the fact, sought to be established, was, that a bond had been executed by the defendant to the plaintiff, which the defendant had got possession of,) he refused to admit, as evidence of this fact, the declarations of the defendant's agent, who had been employed to keep the bond for the plaintiff's benefit, and who, on it's being demanded by the plaintiff, informed him that it had been delivered to the defendant (2). "The admission of an agent, (continued the Master of the Rolls,) cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say, a man is precluded from questioning or contradicting any thing, that any person may have asserted, as to his conduct or agreement, merely because that person has been an agent. If any fact, material to the interest of either party, rests in the knowledge of an agent, the general rule is, that it ought to be proved by his testimony, not by his mere assertion."

The force and effect of an admission must of course depend upon the circumstances, under which it has been made. In many cases, it will be evidence of the strongest kind, if clearly proved: in some, it amounts to little. A full and free admission of a debt is, unless satisfactorily explained, conclusive against the party who makes it. On the other hand, an offer to pay money by way of compromise, and to get rid of an action, is not evidence of a debt (3): in such cases, the point to be considered is, what the view and intention of the party was in making the offer, whether to buy peace, or from a conviction of the justice of

(1) 10 Ves. 128.
(2) Fairlie v. Hastings, 10 Ves. 128; Young v. Wright, 1 Campb. 139; Wilson v. Turner, 1 Taunt. 398.
(3) Bull. N. P. [236.]

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the demand against him. "Thus if A sue B for 100l., and B offer to pay him 20l., it shall not be received in evidence, for this neither admits nor ascertains any debt, and is no more than saying he would give 20l. to get rid of the action. But if an account consists of ten articles, and B admits that a particular one is due, it is good evidence for so much (1)." Admissions of particular articles before an arbitrator are also evidence under the same limitation, that is, when they are made, not with a view to a compromise, but while the parties are contesting their rights. (2)

Admissions by a party to the suit are evidence, whether made before or after the commencement of the action, whether before arrest or after, whether in writing or by parol. The recital of a fact in the counterpart of an indenture is evidence against the party by whom the deed is executed (3). So, answers in chancery are evidence in trials at law against the party that made them (4), and very strong evidence, as they are delivered in upon oath.

It it scarcely necessary to observe, that the whole of the answer or admission must be taken together, in order to shew distinctly the full meaning and sense of the party. Thus, if a person, in making an admission against his own interest, refers to a written paper, without which the admission is not complete, the contents of the paper ought to be shewn, before the statement can be used as evidence against the party (5). Or, if a person says, "that he did owe a debt, but that he had paid it," such an admission will not be received as evidence to prove the debt, without being also evidence of the payment (6). What he has said in his own favour may perhaps weigh very little with

(1) Bull. N. P. [236.]

(2) Bull. N. P. Ib. 1 P. Wms. 497. Slack v Buchanan, Peake N. P. C. 5. Waldridge v. Kennison, 1 Esp N. P. C. 143.

(3) Burleigh v. Stibbs, 5 T. R. 465 See *infra*, as to recitals.

(4) Bull. N. P. 237.

(5) See Jacob v. Lindsay, 1 East, 462. Smith v. Young, 1 Campb. N. P. C. 43[illegible]. Ld. Barrymore v. Taylor, 1 Esp. N. P. C. 325. Randle v. Blackburn, 5 Taunt. 245.

(6) Anonym. case, cited 12 Vin. Abr. (A. b. 23.)

the jury, while his admission against himself may be conclusive; however it is reasonable, that if any part of his statement is admitted in evidence, the whole should be admitted. (1)

An admission by the defendant, that he owes a certain sum of money to the plaintiff, is strong evidence against him in an action to recover the debt, but it will not be *conclusive;* the defendant, if he can, may prove the fact of payment, or shew a receipt, or give other evidence to repel the presumption arising from his acknowledgment. A bill delivered by an attorney to his client, for business done during a certain period, is strong presumptive evidence against any additional item within the same period; but the bill is not like a deed to operate as an estoppel, and the party will be at liberty to prove the fact of his having transacted other business for the defendant (2). A notice to quit at a certain time is primâ facie evidence, that the tenancy commenced at that period, if the notice was served personally on the tenant, and if he made no objection to the time of quitting mentioned in the notice (3). The circumstance of his not making such an objection has been considered as primâ facie evidence of an admission and acquiescence. If, on the other hand, it should be made to appear, that at the time of the service the tenant did not look at the notice so as to know its contents, such evidence would completely repel the supposition of any acquiescence on the part of the tenant; for he cannot be supposed to admit a fact, of which he does not appear to have been informed.

(1) See also Green v. Dunn, 3 Camp. N. P. C. 215. Smith v. Young, 1 Campb. N. P. C. 439.

(2) Loveridge v. Botham, 1 Bos. & Pul. 49.

(3) Doe d. Clarges v. Forster, 13 East, 405.

SECT. V.

Of the Admissibility of the Confession of a Prisoner against himself.

SINCE an admission is evidence against a party in civil suits, with much stronger reason is the voluntary confession of a prisoner evidence against him on a criminal prosecution; for it is not to be conceived, that a man would be induced to make a free confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. The general rule on this subject was very fully considered in a judgment delivered by Mr. Justice Grose, on a case reserved for the opinion of the twelve judges (1); and it seems to be now clearly established, that a free and voluntary confession by a person accused of an offence, whether made before his apprehension or after, whether on a judicial examination or after commitment, whether reduced into writing or not, in short, that any voluntary confession, made by a prisoner to any person at any time or place, is strong evidence against him; and, if satisfactorily proved, sufficient to convict without any corroborating circumstance (2). But the confession must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of a threat or promise: for, however slight the promise or threat may have been, a confession so obtained cannot be received in evidence (3), on account of the uncertainty and doubt, whether it was not made rather from a motive of fear or of interest than from a sense of guilt.

In Lambe's case (4), before mentioned, the question for the opinion of the judges was, whether a written examina-

(1) Lambe's case, 2 Leach Cr. C. 625. Hawk. P. C. b. 2. c. 46. s. 31. Thomas's case, 2 Leach, 728.

(2) Wheeling's case, cor. Ld Kenyon C. J. 1 Leach, Cr. C 349. n. (a).

(3) Thompson's case, 1 Leach. Cr. C. 327. Cass's case, n. (a), ib. 328. Warwickshall's case, 1 Leach, Cr. C. 299.

(4) 2 Leach, Cr. C. 265. Thomas's case, ib 727, S. P.

tion,

tion, taken by a committing magistrate and containing a confession, which the prisoner on hearing it read over to him admitted to be true but refused to sign, ought to have been received in evidence, as it was not signed either by the magistrate or by the prisoner; and a majority of the judges held, that such a confession would have been evidence at common law, and that it is not rendered inadmissible by any provision, in the statutes of Philip and Mary respecting examinations and informations before justices of the peace. If a prisoner's confession, even when not reduced into writing, be evidence against him, *a fortiori* it must be admissible, when taken down in writing; for, the fact confessed, being thus rendered less doubtful, is of course entitled to greater credit; and it would be absurd to say, that an instrument is invalidated by a circumstance, which gives it additional strength and authenticity. (1)

The informations against the prisoner are to be taken on oath; the examination of the prisoner ought to be without oath (2). And whenever a confession is given in evidence, the whole of what has been confessed must be taken together (3): but if only the material parts of the confession are taken down in writing, and they are afterwards read over in the presence of the prisoner, and admitted by him to be true, that admission will make them evidence (4). The statute of Philip & Mary requires the Justice to take the examination, *or so much thereof as is material*, &c. The confession is evidence only against the person confessing, not against others, although they are proved to be his accomplices. It was resolved by all the judges in the case of Tong and others (5), on an indictment for high treason, that a confession by one of the prisoners was evidence only against the party himself who made the confession, and could not

(1) See Mr. Justice Grose's judgment in Lambe's case, 2 Leach, Cr. C. 629.

(2) Bull. N. P. 242. Hawk. P. C. b. 2. c. 46. s. 37. Kelyng, 2.

(3) Hawk. ib. s. 42. R. v. Paine, 5 Mod. 165.

(4) Lambe's case, 2 Leach, Cr. C. 265. Milward v. Forbes, 4 Esp. N. P. C. 171.

(5) Kelyng, 18., res. 5. Gilb. Ev. 124.

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be made use of as evidence against any others, whom on his examination he confessed to be in the treason.

The confession of a prisoner is not to be taken in parts, but the whole together; that what is given in evidence may be neither more nor less than the prisoner intended. If the confession is not in writing, the whole of what the prisoner said must be fully stated, although it may happen that some part of it concerns other prisoners who are tried on the same indictment; in such a case it is not possible to make any selection, for, until the evidence has been heard, it cannot be known what it is, or to whom it relates; and all that can be done is to direct the jury not to take into their consideration such parts as affect the other prisoners. But a distinction might perhaps be made in this respect, in case the confession has been reduced into writing, if that part which relates to the other prisoners is capable of being separate and detached from the rest, and can be omitted without affecting in any degree the prisoner's narrative against himself.

It has been determined by all the judges, that, although confessions improperly obtained are not admissible, yet that any facts, which have been brought to light in consequence of such confessions, may be properly received in evidence. Thus, where a prisoner was charged, as accessary after the fact, with having received property knowing it to be stolen, proof was admitted of the property being found concealed in the prisoner's lodgings, although the knowledge of that fact had been gained from an inadmissible confession (1). Some indeed have thought, that the circumstance, of the fact being known in consequence of information received from the prisoner, ought not to be shewn at the trial. But a different practice appears to be established by later authorities; and, on a prosecution for receiving stolen goods, evidence has been admitted that the prisoner described the

(1) Warwickshall's case, 1 Leach, 301. Lockhart's case, ib. 43[illegible] 2 East, Cr. C. 308. Mosey's case, ib. n. (a), P. C. 6[illegible]8 S. C.

 place

place where the goods were concealed, and that afterwards they had been found there; but that part of the confession, in which he acknowledged that he himself had concealed them, was rejected, as it was improperly drawn from him (1). There is good reason for this distinction; for, what the prisoner has said respecting the concealment of the property is ascertained to be true by the fact of the subsequent discovery, but the other part of the confession, in which he charges himself with having concealed it, may have been made untruly and entirely under the influence of the threat or promise.

In cases of high treason

There has been some difference of opinion, respecting the sufficiency of this kind of evidence in trials of high treason. The stat. of the 7th W. 3. c. 3. s. 2. enacts, "that no person shall be indicted, tried, or attainted, for high treason or misprision of high treason, but upon the oaths and testimony of two witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason, unless the party indicted and arraigned shall willingly without violence in open court confess the same." Mr. Justice Foster (2) seems to have been of opinion, that the legislature intended by this section to require two witnesses to the overt acts in all cases, except where the prisoner confessed the treason upon his arraignment in open court, and that to warrant a conviction there must be proof of the overt acts upon oath, not merely proof of the confession of the overt acts. "But, he adds (3), perhaps it may now be too late, to controvert the authority of the opinion in 1716, in Francia's case, warranted as it hath been by later precedents (4)." All the judges, on a conference preparatory to the trial of Francia (5), held, that a confession of the overt acts, if proved by two witnesses, would be sufficient to convict the prisoner. The same con-

(1) Grant's case, and Hodge's case, 2 East, P. C. 658. 1 Leach, Cr. C. 301. n. (a), S. C.

(2) See Fost. Disc. 240. 243. Willis's case, ib. 242. Smith's case, ib.

(3) Fost. Disc. 243.

(4) See Fost. Disc. 11. note.

(5) Francia's case, 1716. Mr. J. Burnet's MS. 1 East, P. C. 133.

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struction of the statute was adopted in Greg's case (1), by six judges against two: in Berwick's case (2), by Ld. C. J. Willes and Sir Thomas Abney against the opinion of Mr. Justice Foster; and by the judges in the commission, on the trial of the rebels in 1746. (3)

With regard to all collateral facts, which do not conduce to the proof of the overt acts, it may be laid down as a general rule, that whatever was evidence of them at common law is still good evidence under the statute. (4) Such facts may therefore be proved by a single witness. Thus, in Vaughan's case (5), where the prisoner endeavoured to prove himself a subject of France, the counsel for the crown produced evidence of his being born in Ireland; and, on its being objected by the prisoner's counsel, that there was but one credible witness to that fact, Lord Holt C. J. said, "that it is no overt act: if there be one witness to that, it is enough: there need not be two witnesses, to prove him a subject."

From the above-cited cases, it appears now to be an established rule, that a full and voluntary confession by the prisoner of the overt acts charged against him is of itself sufficient evidence to warrant a conviction. And, although Mr. Justice Foster suggests (6), that "the rule, for admitting a confession against the prisoner, ought not to extend further than to a confession made during the solemnity of an examination before a magistrate or before some person having authority to take it, when the party may be presumed to be properly upon his guard and apprised of its danger," no distinction of this kind is to be found in the authorities before mentioned. On the contrary, in Francia's case the judges resolved, that the confession would be evidence, whether made before a magistrate or in

(1) Greg's case, 1 East, P. C. 134.
(2) Fost. Disc. 10.
(3) Fost. Disc. p. 11. n. (†). 1 East, P. C. 134.
(4) Fost. Disc. 242.
(5) 5 State Tr. 17. Fost. Disc. 240.
(6) Fost. Disc. 243. 4 Black. Com. 356.

the course of conversation (1). And there appears to be no solid ground for such a distinction; as confessions are admissible in trials for high treason, precisely on the same principle, which made them evidence at common law. The observations of Mr. Justice Foster relate to the effect rather than to the admissibility of this sort of evidence, and are equally applicable to confessions in any other criminal case. "Hasty confessions, he says (2), made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured: words are often mis-reported (whether through ignorance, inattention, or malice—it mattereth not to the defendant—he is equally affected in either case): they are extremely liable to misconstruction: and withal, this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be and often is confronted."

Sect. VI.

Of the Admissibility of the Party injured, as Witness in Criminal Prosecutions.

It is a general rule, that in criminal prosecutions the injured party may be a witness: although on the conviction of the prisoner he will in many cases be entitled to a reward. *

(1) See Burnet, J. MS. cited 1 East, P. C. 133., and Kelyng, 19.

(2) Fost. Disc. 243.

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* A reward of 40l. is granted for apprehending and prosecuting to conviction highway robbers, (4 W. & M. c. 8. s. 2.), offenders against the acts for preventing counterfeited coin, &c. (St. 6 W. 3. c 17. s. 9.; 15 G. 2. c. 28. s. 7.), prisoners charged with burglary or breaking and entering houses in the day-time, (St. 5 Ann. c. 31. s. 4.), or charged with taking rewards for helping to stolen goods without prosecuting the felon (St. 6 G. 1. c. 23. s. 9.). A reward of 50l is granted for apprehending and convicting smugglers who oppose custom-house and excise officers by force of arms, &c. (St. 9 G. 2. c. 35. s. 11.), or offenders against the

It is the constant practice on an indictment for robbery, to admit the evidence of the person who has been robbed; and it is not a sufficient objection, that he will be entitled to the restitution of his property, on the conviction of the offender. The same evidence is admitted in prosecutions for a cheat (1), or for perjury (2); and, in the case of perjury, it is not material, whether he has or has not satisfied the judgment in the suit in which the perjury was committed. It was, indeed, at one time thought an indispensable requisite to shew the judgment satisfied (3); on the supposition, that, in case of his procuring a conviction, he might use it for the purpose of obtaining relief in equity against the judgment. But, as it is now an established rule, that a court of equity will not grant relief on a conviction, which proceeds on the evidence of the prosecutor (4), there can be no objection to his being admitted a witness. And in other cases, the party aggrieved will be allowed to give

(1) Parris's case, 1 Vent. 49. 2 Sid. 431. S. C. R. v Macartney, 1 Salk. 286.

(2) R. v. Broughton, 2 Str. 1230. R. v. Boston, 4 East, 581. contra, R. v. Ellis, 2 Str. 1104., R. v. Nunez, 2 Str. 1042., R. v. Whiting, 1 Salk. 283. But Lord Mansfield, in Abraham q t. v. Bunn, 4 Burr. 2255. cites the case of R. v. Broughton as over ruling the three last mentioned cases.

(3) R. v. Eden, 1 Esp. N. P. C. 97. R. v. Dalby, Peake, N. P. C. 12.

(4) Bartlet v. Pickersgill, cited in Abraham v. Bunn, 4 Burr 2255. by Ld. Mansfield, C. J., and in R. v. Boston, 4 East, 577. by Ld. Ellenborough.

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the Black Act, (St. 9 G. 1. c. 22. s. 12.). and a reward of 10l. for apprehending and convicting stealers of sheep or other cattle. The apprehenders of highway robbers are also entitled to the robber's goods found upon him, provided they were not before stolen. By the Stat. 21 Hen. 8. c. 11., the person, from whom money or goods have been stolen, is entitled to restitution, on the conviction of the robber. By the St. 5 Eliz. c. 9. s. 8., persons convicted of perjury within that act are subject to certain forfeitures, a moiety of which is for the party grieved, and to be recovered by action. By St. 25 G. 2. c. 36. s. 11., in case of a conviction of felony, the prosecutor is entitled to his expences of prosecution, as may seem reasonable to the Court, on consideration of his circumstances; and, in the case of a writ of certiorari obtained by a person who had been indicted before the quarter sessions, the party injured prosecuting will be entitled to costs on the conviction of the defendant, by St. 5, 6 M. 3. c. 11. s. 3. It may be observed generally, of all those cases, that such circumstances will not affect the *competency* of the witness. If his evidence were to be excluded, the very object of the legislature would in most cases be entirely defeated.

evidence on a criminal prosecution, as he cannot afterwards avail himself of the record of conviction in any future suit, in order to prove the criminal act (1). For this reason, it is conceived, on an indictment for perjury the party injured may be a witness, whether the prosecution is by the common law or founded on the stat. 5 Eliz. c. 9., which gives him half the forfeiture incurred; for, if in an action to recover his moiety he would be precluded from giving the conviction in evidence, the objection against his competency seems to be removed. *

In the of forgery.

An exception, however, has been made to this general rule, in the case of a prosecution for forgery, in which the party, by whom an instrument purports to be made, is not admitted to prove it forged, if he would either be liable to be sued upon the instrument (supposing it genuine), or be thereby deprived of a legal claim against another (2). And it seems to be the prevailing opinion, that his incompetency is not confined to the single point of falsifying the hand-writing, but that he is equally incompetent to prove any other fact, which contributes to the proof of the forgery, or, in other words, any fact conducive to the general conclusion. This subject was much discussed in a late case (3), where, on a prosecution for forging a promissory note, on which there was an indorsement in the prisoner's hand-writing, that a year's interest had been paid, one of the points reserved was, whether the person, by whom the note purported to be made, ought to have been permitted to prove that he had never paid any interest on the note,

(1) Bartlet v. Pickersgill, 4 East, 577. n. (b) R. v. Boston, 4 East, 581. Smith v. Rummens, 1 Camph. N. P. C. 9. Hathaway v. Barrow, 1 Campb. N. P. C. 151. 1 Taunt. 520.

(2) Watts's case, Hard. 331. 3 Salk. 172. S. C. Rhodes's case, 2 Str. 728. 1 Leach, Cr. C. 29. S. C. Russel's case, 1 Leach 10. Caffy's case, 2 East's P. C. 995. Taylor's case, 1 Leach, 255. Crocker's case, 2 New Rep. 87.

(3) Crocker's case, Salisb. Ass. 1805, cor. Le Blanc J., 2 Bos. & Pul. N. R. 87. 90. R. v. Bunting, 2 East, P. C. 996.

* Ruled contra in an old case; Bacon's case, 2 Roll. Abr. 685; Bull. N. P. 289. S. C. Gilb. Ev. 111. S. C.

as

as was pretended by the indorsement. This evidence was received on the trial, the fact of the forgery having been first proved; but, according to the report, it seems to have been generally understood that the majority of the judges considered the evidence inadmissible *. When, however, the fact is merely collateral, and does not in any way contribute to the proof of the forgery, as, where a witness is called to prove himself the person, whom the prisoner intended to personate or describe, in such a case his testimony has been admitted. (1)

It is scarcely necessary to add, that if the witness would not incur any loss, nor be liable to a suit, whatever may be the result of the prosecution, his evidence ought to be received. Thus, on an indictment for forging a banknote, in the name of a cashier of the bank of England "for the governor and company," the cashier, not being chargeable, may be a witness (2). And on a prosecution for forging an acceptance to a bill of exchange, where the banker had paid the bill, but suspecting a forgery had not debited the person whose name was forged, this person was admitted to give evidence. (3)

Upon what principle, it may be asked, is a party, by whom an instrument purports to be made, incompetent to prove it forged? In Watt's case (4), on an information for

(1) Parr's case, 2 Leach. Cr. C. 487. 491. 2 East. P. C. 997. S. C.

(2) Newland's case, 1 Leach, Cr. C. 350.

(3) Usher's case, 1 Leach Cr. C. 57.; and see Well's case, Bull. N. P. 289, 2 East, P. C. 1000, S. C.; Sponsonby's case, 1 Leach Cr. C. 374.

(4) Watt's case, 3 Salk. 172, more fully reported in Hardr. 331. See 4 Burr. 2254., where Ld. Mansfield says that this and other cases of the same kind were "not considered or looked into."

* Lord Ellenborough C. J., the Chief Baron Macdonald, Mr. Justice Lawrence and Mr. Justice Le Blanc thought the witness admissible, because it had been sufficiently proved before, that the note was not signed by him; and they thought him admissible to all points except that of the forgery. Some of the other judges seemed to think, that to points perfectly collateral he would have been admissible, but they considered the point, to which he was called, as contributing to prove the forgery. M.S.

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the forgery of a deed purporting to be the revocation of a will, it was adjudged by the barons of the exchequer after a conference with the judges of the King's Bench, that no legatee named in the will, nor any other person who is a loser by the deed, or who may receive any advantage from the verdict, can be a witness for the prosecution: and a distinction was made between the case of an indictment for a battery, (where, it was admitted, the person beaten may be witness, because he can reap no benefit by the verdict in another suit,) and the cases of forgery, perjury, or usury, in which, it was said, the party aggrieved may have an advantage by the verdict, and therefore shall not be received as a witness. It is however now an established rule, that on a prosecution for perjury (1) the party aggrieved is competent: and, that a person who has borrowed money on an usurious transaction, is also a competent witness for the plaintiff in an action for penalties against the lender (2); for he gains nothing by the event of the suit, nor can he give the judgment in evidence in an action against him for the money lent. The case of forgery, therefore, stands by itself, and is considered an anamoly in the law of evidence. The reason assigned in Watt's case is, that the witness would receive a benefit from the verdict; and it has been suggested (3), that he is interested to procure a conviction, on the ground that a conviction would have the effect of inducing a forfeiture, and thus defeat every legal claim or security, which the prisoner might have upon the instrument. On the other hand, it may be said, if the party, by whom the instrument purports to be made, were admitted a witness, he would not be allowed afterwards to produce the record of conviction in a civil suit for the purpose of proving the supposed forfeiture, because the parties in the action would not be the same as in the prosecution, but principally, because the conviction must have proceeded partly upon his own testimony. And, if he would be precluded

(1) See ante, p. 87. (a).

(2) Abraham q. t. v. Bunn, 4 Burr. 2251. Smith v. Prager, 7 T. R. 60. See ante p. 39.

(3) 2 East, P. C. 994.

cluded from using the record of conviction against the prisoner, and might therefore be admitted to give evidence on the trial consistently with the general rule; still less reason is there for excluding him in those cases, where the instrument purports to be made for the benefit of a third person, or where it has since become a third person's property, in either of which cases it would not be liable to forfeiture. With regard to any probable advantage which the witness may be supposed to receive from a conviction, (whether by the practice of impounding forged instruments, or by the prisoner's being disabled from giving evidence in any future suit, or from the great probability of his failing in an action in consequence of the discredit which a conviction must throw upon the instrument,) these are circumstances which a jury would be directed to consider as forming a strong bias on the witness's mind, but which cannot render him incompetent.

Sect. VII.

Of certain Exceptions to the general Rule on the Subject of Interest.

It has been before stated as a general rule, that all persons, who gain or lose directly by the event of a cause, are incompetent to give evidence. There are, however, several exceptions to this general rule: some, by act of parliament, as, where informers and the inhabitants of parishes or other districts are admitted; others, from necessity or a principle of public policy, as, where evidence is received from persons who are entitled to rewards on convictions, or from agents, factors, or servants. Objections on the ground of interest proceed upon the supposition of too great a bias in the mind of the witness, and the public utility of rejecting partial testimony. The presumption of bias may be taken off, by shewing, that the witness has as great or greater interest the other way, or that he has given it up; and the presumption of public utility may be answered, by shewing, that

that it would be very inconvenient, under the particular circustances, not to receive such testimony. (1)

First, as to the evidence of informers;

Informers. By the common law, informers, who are entitled under penal statutes to part of a penalty, are not competent witnesses (2). But by the particular provisions or policy of several acts of parliament they may be admitted. Where a statute can receive no execution, unless a party interested be a witness, there he must be allowed, says Ch. B. Gilbert; for the statute must not be rendered ineffectual by the impossibility of proof. (3). Thus, by stat. 2 G. 2. c. 24. s. 8. against bribery at elections, the legislature in giving an indemnity and discharge to any person offending against the act, who shall discover any other offender so that he may be committed, must also have intended that he should be competent to give evidence at the trial; and therefore in an action for penalties he has been admitted (4). So, in a prosecution on stat. 21 G. 3. c. 37. against exporting machinery, the informer is competent (5). So, on a prosecution for penalties under stat. 9 Ann. c. 14. s. 5., the loser of money at cards may prove his loss (6). And, on a prosecution under stat. 23 G. 2. c. 13. s. 1. for seducing artificers to go out of the kingdom, the prosecutor is a competent witness, although entitled to a moiety of the penalty (7). There is no *express* provision in either of the three acts of parliament last mentioned, for admitting the evidence of the party interested. In the act of the 32 G. 3. c. 56. for preventing counterfeited certificates of servants' characters, there is a clause (8) to that effect; and a similar

(1) By Lord Mansfield. 1 Burr. 422.

(2) R. v. Tilly, 1 Stra. 315. R. v. Stone, 2 Lord Raym. 1545, R. v. Blaney, Andr. 240. 3 Burr. 1473. 4 East, 181.

(3) Gilb. Ev. 114.

(4) Bush v. Railing, Say. 289. Mead v. Robinson, Willes 425. Heward v. Shipley, 4 East. 182.

(5) R. v. Teasdale, 3 Esp. N. P. C. 68.

(6) R. v. Luckup, Willes, 425. (*c*).

(7) R. v. Johnson, Willes Rep. 425. n. (*c*).

(8) Sect. 7.

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provision is made by the act which regulates hackney coaches, stat. 33 G. 3. c. 75. s. 17.

Inhabitants of counties, parishes, &c.

Secondly, On an indictment against private persons or corporate bodies for not repairing a public bridge or the highway adjoining, the inhabitants of the county, town, riding, &c. in which the bridge is situated, are competent witnesses in support of the prosecution, by the 1st Ann. stat. 1. c. 18. s. 13. Even before this statute, such evidence had been thought admissible (1) from necessity.

In an action by a party robbed against the hundred, the inhabitants of the hundred may be witnesses for the defendants, by stat. 8 G. 2. c. 16. s. 15. Before this act passed, they were not competent, because any one of them would have been liable to pay the debt, in case of judgment against the hundred. (2)

In all cases relative to the execution of the highway act, the surveyor of the parish or place is a competent witness, though part of his salary may arise from forfeitures and penalties inflicted under the act (3). And, on trials of offences against the same act, the inhabitants of the parish or place are also competent. (4)

Where pecuniary penalties are directed to be applied to the use of the poor, or for the benefit and exoneration of the parish or other place, the inhabitants are rendered competent witnesses on the trial of the offender, by stat. 27 G. 3. c. 29, provided the penalty inflicted by the act of parliament does not exceed twenty pounds. (5)

It has been lately provided by stat. 54 G. 3. c. 170. s. 9., that no inhabitant of any district, parish, &c., who is

(1) Per. Cur. in R. v. Carpenter, 2 Show. 47.

(2) Per. Cur. in R. v. Carpenter, 2 Show. 47. 2 Hal. P. C. 280. R. v. Kirdford, 2 East, 561.

(3) Stat. 13 G. 3. c. 78. s. 69.

(4) Sect. 77. and Stat. 30 G. 2. c. 22. s. 14.

(5) R. v. Davis, 6 T.R. 177.

rated,

rated, or who is maintained by the rates, or who holds any office in the district, shall be deemed on such account an incompetent witness, for or against such district, parish, &c., in any matter relating to such rates, or relating to the boundary between such district and any adjoining district, or to any order of removal to or from such district, or to the settlement of any pauper in such district, or touching any bastards chargeable or likely to become chargeable to such district, or touching the recovery of any sum for the charges or maintenance of such bastard, or the election or appointment of any officer, or the allowance of the account of any officer of such district.

Persons entitled to rewards.

Thirdly, persons entitled to rewards on the conviction of offenders, whether the rewards are given by act of parliament proclamation or by private persons, and persons entitled to the restitution of their property on the conviction of a thief, are competent to give evidence. (1)

Agents, &c.

Fourthly, it is the constant practice to admit agents to be witnesses for their principals, in order to prove contracts made by them on the part of the principal; and this is allowed from necessity, or rather for the sake of trade and the common usage of business. Thus, a factor may prove a sale, though he is to receive a poundage on its amount (2), or what he has bargained for beyond a stated sum (3). And every person who makes a contract for another, is an agent within the meaning of this rule (4). So where the question was on the custom of a manor, whether a fine was due to the lord during his minority on the tenants' admission, the steward of the manor was allowed to give evidence for the lord, though it was objected to him, that he would be entitled to a fee on admission, which he would lose,

(1) Per Cur. in Rudd's case, Leach Cr. C. 157, 158. ib. 353. n. Hawk. P. C. b. 2. c. 46. s. 135. See ante, p. 86.

(2) Dixon v. Cooper. 3 Wils. 40. 1 Atk. 248.

(3) Benjamin v. Porteus, 2 H. Bl. 590. R. v. Phipps, Bull. N. P. 289

(4) 2 H. Black. 591.

if

if the tenant were not admitted (1). And freemen, as was before mentioned, have been allowed to be witnesses in certain cases, although interested, from mere necessity.

On the same principle of convenience, it is the common practice to admit servants and agents, without a release, to prove the payment or receipt of money, or the delivery of goods, on behalf of their master or principal, though their evidence tends to discharge themselves (2). Thus, if money has been overpaid by a servant or paid by mistake, he is a competent witness, in an action to recover it back (3). But where a person has entered into a contract for the purchase of goods *in his own name*, it has been held that he is not a competent witness in an action for goods sold and delivered to prove that he purchased them as *the agent* for the defendant (4). If the agent is equally liable to either party, and indifferent in point of interest, whichever way the verdict may be, he is clearly a competent witness on the general principle (5). The practice of admitting servants without a release, to prove a delivery of goods, or the payment of money, and the like, is for public convenience, "for the sake of trade and the common usage of business (6)." This sufficiently explains the principle, and at the same time shews the restrictions, to which the practice is subject. Where the act of the servant has been out of the ordinary course of his employment, and a mere breach of duty, the principle does not apply: and it has therefore been ruled at Nisi Prius, that in such a case the servant is not a witness for his master without a release. Thus, in an action to recover back money, which had been entrusted to the plaintiff's servant for a special purpose, and paid by

(1) Champian v. Atkinson. 3 Keb. 90. Rep. temp. Hard 360. See R. v. Phipps and Archer, ante. p. 59.

(2) Per Holt C. J. in Theobald v. Tregott, 11 Mod. 262. Bull. N. P. 289. 4 T. R. 589, 590. Matthews v. Haydon, 2 Esp. N. P. C. 509. Spencer v. Golding, Peake N. P. C. 129. Adams v. Davis, 3 Esp. N. P. C. 48.

(3) Martin v. Howel, 1 Str. 647 Barker v. Macrae, 3 Campb. 144.

(4) M'Braine v. Fortune 3 Campb. 317.

(5) See ante. p. 53.

(6) Bull. N. P. 289.

the

the servant in illegal insurances, he was considered incompetent without a release (1). And in an action against the defendant for the negligence of his servant, he is not competent to disprove the fact of his negligence (2): for since the verdict might be given in evidence in an action by the defendant against the witness, as to the quantum of damages, the servant is directly interested to defeat the action, and does not come within the exception above specified.

SECT. VIII.

Of the means by which the Competency of an interested Witness may be restored.

THE last question that remains to be considered on this part of our subject, relates to the regular mode, of making the objection to the competency of a witness, and to the means of restoring his competency.

The rule formerly was that the objection ought to be made on the voire dire, and was not to be allowed after the examination in chief. But for the convenience of the court, and because the incompetency may not at first be suspected, a greater latitude has been allowed. And now, if it is discovered during any part of the trial that a witness is interested, his evidence will be struck out. (3)

When the objection arises from a witness's answer on the voire dire, it may be likewise removed on the voire dire. The party who calls him may examine as to the

(1) Corking v. Jarrard, 1 Campb. 37. In Clarke v. Shee, Cowp. 199, which was a similar case, a release was given. See anonymous case, 1 Salk. 289; Bull. N. P. 39. 289. S. C.; and anonymous case, Bull. N. P. 290. These were actions by a master to recover property embezzled by his servant, and the servant was admitted a witness to prove delivery to the defendant; but it does not appear whether the plaintiff gave a release.

(2) Green v. New Riv. Comp. 4 T. R. 589. 3 Camp. 516. 523. Bird v. Thompson. 1 Esp. N. P. C. 339. Miller v. Falconer. 1 Campb. 251. 6 Esp. N. P. C. 73.

(3) Turner v. Pearte, 1 T. R. 720. Perigal v. Nicholson, 1 Wightwick, 64. Howel v. Lock, 2 Campb. N. P. C. 14.

con-

continuance of his interest, and need not give the best and strictest proof of his competency being restored. Thus, where, in an action brought by a chartered company, a witness for the plaintiffs admitted on the voire dire, that he had been a freeman of the company, but added that he was then disfranchised, Lord Kenyon ruled at Nisi Prius, that it was not necessary to prove the disfranchisement by the regular entry in the company's books, and that the witness was competent (1). And, in a later case, on a question of settlement, where the point for the consideration of the Court of King's Bench was, whether a witness produced by the appellants could be examined, after having admitted in his examination on the voire dire that he was the occupier of a cottage in the appellant township, but that he had never been charged with or paid any public rate or tax in that township, the court held, that there was no ground for objecting to his testimony, and that it was not necessary for the appellants to produce the rate, in order to negative the rating. (2)

Whatever interest a witness may have had, if he is divested of it by release or payment or any other means, when he is ready to be sworn, there is no objection to his competency. Thus it is said "to have been solemnly agreed by the judges, that where a person had a legacy given him and did release it, he was a good witness to prove the will (3)*."

So

(1) Butchers' Company v. Jones, 1 Esp. N. P. C. 162. acc. Botham v. Swingler, Peake, N. P. C. 218; 1 Esp. N. P. C. 164 S. C.

(2) R. v. Gisburn, 15 East, 57.

(3) Vin. Ab. tit. Evidence, 14, n. 53. cited by Ld. Mansfield. 1 Burr. 423.

* Lord Chancellor Hardwicke established the will of Lord Ailesbury on similar proof, in the year 1748. (See 1 Burr. 427.) And in Wyndham v. Chetwynd, (1 Burr. 414.) where the subscribing witnesses were creditors of the testator, as their debts had been paid, they were admitted to prove the will. So in Doe dem. Hindson v. Kersey (4 Burn Ec. Law, 97.) three of the judges were of opinion, that a subscribing witness was restored to his competency, if all his interest had been released or extinguished at the *time of the examination*. Lee C. J. in Anstey v.

Dowsing

So on a trial for forgery, a release from the holder of a promissory note to the supposed drawer, in whose name it was forged, (there being no other name on the note to whom the drawer could be liable,) made him a competent witness to prove the forgery of his hand-writing (1). To restore the competency of a bankrupt, (who, from being interested to increase the fund, cannot be admitted to prove property in himself or a debt due to his estate) (2), it must be shewn, that he has obtained his certificate and given to the assignees a release of his share in the surplus and in the dividends (3). If he gives a general release to his assignees, it is sufficient; as it discharges him from receiving any sum of money from the assignees (4). But no release can make the bankrupt a witness to prove his own act of bankruptcy (5). And, after a second bankruptcy, he cannot be a witness to increase the fund, even with a certificate and release, unless he has paid fifteen shillings in the pound; for, in the event of his not making that payment under the second commission, his future effects are liable. (6)

When a witness is objected to as the member of a corporation, whose interests are in question, his competency may be restored either by his resignation, (which will be effectual even by parol, provided that it has been accepted, and another person elected in his place) (7), or by disfranchisement.

(1) Akehurst's case, 1 Leach Cr. C. 178. Dr. Dodd's case, ib. 184.

(2) See ante, p. 51.

(3) Ewens v. Gold, Bull. N. P. 43.

(4) Nares v. Saxby, cited 2 T. R. 497.

(5) Field v. Curtis, 2 Str. 829. See ante, p. 51.

(6) By st. 5 G. 2. c. 30. s. 9. Kennet v. Greenwollers, Peake, N. P. C. 3.

(7) R. v. Mayor, &c. of Rippon, 2 Salk. 432. Com. Dig. tit. Franchise. (F. 30.)

Dowsing (2 Str. 1253.); and Ld. Camden C. J. in Doe on the demise of Hindson v. Kersey were of opinion, that if a subscribing witness was interested at *the time of attestation*, nothing *ex post facto* could give effect to his attestation. In the former of these cases, Mr. Justice Dennison differed from Lee C. J. on this point. (See 1 Burr. 427, 8.)

The

The method of disfranchisement is said to be by an information in the nature of a quo warranto against the member, who then confesses the information, and upon that there is judgment of disfranchisement (1). This judgment must be such as cannot be avoided: for if it appears that the witness can avoid the judgment for irregularity, (as when he had never been summoned, and knew nothing of his disfranchisement,) he is not competent. (2)

A release is in some cases unnecessary. And the witness though interested will be admitted without a release.

1. As, first, where the witness offers to surrender or release his interest, and does all in his power to clear away every objection to his testimony, but the other party refuses to accept it, in that case the evidence of the witness may be received (3). Or if the party, on whose side the witness is interested, makes an offer to remove all interest, and the witness refuses, that will not deprive the party of his testimony. In the case of Anstey v. Dowsing (4), indeed, Lee J. expressed an opinion that a legatee was not competent to prove the due execution of the will, although payment of the legacy was tendered to him, which tender he refused. But the ground of this opinion was, that, even if he had accepted the legacy, he still would have been incompetent, as having been interested at the time of attestation; a point, on which there has been some difference of opinion, but the greatest authorities are in support of the contrary proposition, namely, that the payment of the legacy would restore the competency of the witness.

2. It was ruled by Lord Holt in the case of Barlow v. Vowel (5), that if a man be a witness of a wager and afterwards bet himself, this shall not be a reason to except

(1) The case of the Mayor, &c. of Colchester, 1 P. Wms. 595. n.

(2) Brown v. Corp. of London, 11 Mod. 225.

(3) Goodtitle dem. Fowler v. Welford, 1 Doug. 139. 3 T. R. 35.

(4) 2 Str. 1253. See *ante* p. 27.

(5) Skin. 586. See Rescous v. Williams, 3 Lev. 152; and Cowp. 736.

 against

against his being sworn to prove the wager. And from analogy to this case, Lord Kenyon and Mr. Justice Ashurst were of opinion in the case of Bent v. Baker (1), (where, in an action on a policy of insurance, the broker was called as witness for the defendant, but rejected, because he had underwritten the policy after the defendant,) that, even if it were true in general, that one underwriter could not be a witness for another, yet the witness ought to have been admitted here, as the defendant had acquired an interest in his testimony, before the witness had signed the policy. And they laid down as a general principle, deducible from the case of Barlow v. Vowel, that where a person makes himself a party in interest after a plaintiff or defendant has an interest in his testimony, he may not by this deprive the plaintiff or defendant of his testimony. However it appears to be rather doubtful whether this proposition is not expressed in too large and general terms. Whether a witness is incompetent on account of interest must depend rather on the *nature* of the interest than upon the *time of acquiring* it. The question on the *voire dire* is, whether he is interested at *the time of his examination.* If he is directly interested at that time, he is not a competent witness in general without a release, and it seems to be no answer to the objection, to shew that he has become interested only since the commencement of the action, or since the time of his being acquainted with the fact, which he is called to prove. If, for example, the question is on a customary right of common, a witness will be incompetent, who admits upon the *voire dire* that he is in the occupation of a messuage, and that he claims a similar right of common as annexed to his tenement: and it cannot be material whether he has been in possession for a number of years, or had the tenement only just before the trial of the cause. In either case he appears to be equally incompetent; yet in the latter it may be said, that he acquired his interest, after the party had become interested in his testimony.

(1) 3 T.R. 27.

mony. So in the late case of Forester v. Pigou (1), where the defendant in an action on a policy of insurance called another underwriter to prove the policy void on account of a misrepresentation of the nature of the risk, and upon the *voire dire* the witness stated, "that he had paid th loss to the plaintiff upon an understanding that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff promising to return the money in that event," an objection being taken to his competency, the point was argued on the other side upon the authority of Barlow v. Vowel, but the witness was considered to be incompetent and rejected; for although the witness would not be disqualified by any agreement *fraudulently* entered into between him and the plaintiff for the purpose of taking off his testimony, yet on the other hand the pendency of a suit could not prevent third persons from transacting business *bonâ fide* with one of the parties; and if an interest in the event of the suit is thereby acquired, the general consequence of law must follow, that the person so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage. A motion was afterwards made for a new trial on account of the rejection of this witness, as well as of another also, who was similarly situated; and a new trial was granted for the purpose of ascertaining more particularly the precise time, when the undertaking was made to the witnesses; but the court added, that if a person, who is under no obligation to become a witness for either of the parties to a suit, choose to pay his debt beforehand, upon a condition that is to be determined by the event of the suit, he becomes as much interested in the event, as if he were a party to a consolidation rule. With respect to the case of Barlow v. Vowel, which was much cited in this case of Forester v. Pigou, the Court considered the point as having been there determined on the ground of fraud.—Lord Raymond in the case of the

(1) 1 Maul. & Sel. 9.; 3 Camp. 380, S. C.

King v. Fox (1) admitted the prosecutor to be a witness, although he had laid a wager, that he should convict the defendant: and the reason seems to be, not because the witness had made the wager at a time when public justice became interested in his testimony, but because it would be against public policy to allow a witness by any such gratuitous act to exclude himself from giving evidence; and there seems to be another reason for admitting the witness, since the wager would now probably be considered absolutely void, as tending to produce an improper bias on the mind of the witness, and therefore as directly prejudicial to the administration of justice.

3. When the witness must be answerable to one or the other of the parties, and the event of the suit determines only to which, he may be examined by either of them without a release. Thus in an action of assumpsit for money paid to the use of the defendants, who were ship-owners, Lord Kenyon admitted the captain to prove, that he had received the money from the plaintiff for the defendant's use; for he stood indifferent between the parties, and he was equally answerable, whichever way the verdict might go. (2)

(1) 1 Str. 652.
(2) Evans v. Williams, 7 T. R. 481. n. (c), and see ante p. 53., on this subject.

CHAP. VI.

On the Admissibility of Counsel or Solicitor.

THE objections to the competency of a witness, which have been considered in the four preceding chapters, are of a nature to exclude him from giving any kind of evidence. One other objection still remains to be considered; not an objection to his competency, but to particular evidence, which he may be called upon to disclose. This is founded on the professional confidence, which a client

client reposes in his counsel, attorney, or solicitor, and which courts of justice ever hold to be inviolable (1). Confidential communications between attorney and client are not to be revealed at any period of time — not in an action between third persons — nor after the proceeding, to which they referred, is at an end — nor after the dismissal of the attorney (2). The privilege of not being examined to such points, as were communicated to the attorney while engaged in his professional capacity, is the privilege of the client, not of the attorney; and it never ceases. "It is not sufficient to say, the cause is at an end; the mouth of such a person is shut for ever." (3) But this privilege of the client is confined to such communications, as are made with reference to professional business during the relation of attorney and client. A person by profession an attorney, but not employed as attorney in the particular business, which is the subject of inquiry, is not within the rule, although he may have been consulted confidentially (4). If the party waives his privilege, the witness may of course be examined.

A person, who acts as interpreter between an attorney and his client, stands precisely in the same situation as the attorney himself; he is considered as the organ of the attorney, and is under the same conditions of secresy (5.) But it has been ruled at nisi prius, that a person, who was consulted confidentially on the supposition of his being an attorney, when in fact he was not one, is compellable to answer (6). And propositions, which the attorney of one party has been professionally entrusted to make to the adverse party, though they are not to be disclosed by the

(1) Lord Say and Seale's case, 10 Mod. 40. Bull. N. P. 284. Cuts v. Pickering, 1 Ventr. 197.

(2) Wilson v. Rastall, 4 T. R. 759, 760. R. v. Withers, 2 Campb. N. P. C. 578.

(3) Per Buller J., 4 T. R. 759.

(4) Wilson v. Rastall, 4 T. R. 753 760.

(5) Du Barré v. Livette, Peake, N. P. C. 78. cited by Ld. Kenyon in 4 T. R. 756.

(6) Fountain v. Young, 6 Esp. N. P. C. 113.

attorney himself, may yet be proved by another witness, who heard him deliver them. (1)

This privilege extends to the three enumerated cases of counsel, solicitor, and attorney; but it is confined to those cases alone. There are indeed cases, said Mr. Justice Buller in the case of Wilson and Rastall, to which it is much to be lamented that the law of privilege is not extended; those, in which medical persons are obliged to disclose the information, which they have acquired by attending in their professional characters (2). This point was much considered in the Duchess of Kingston's case, where Sir C. Hawkins, who had attended the duchess as a medical man, was compelled to disclose what had been committed to him in confidence. In a late case at Nisi Prius, where a clerk to the commissioners of the property tax was called to prove the defendant a collector, and refused to give evidence, on the ground of his having taken an oath of office, not to disclose what he should learn as clerk respecting the property tax, except with the consent of the commissioners or by force of an act of parliament, the Court held that this oath would not exempt the witness, and that it must be construed, as containing an implied exception of the evidence, which he might be called to give in courts of justice in obedience to the writ of subpœna (3). In an early case (4), indeed, where the defendant pleaded to an action of debt on bond the statute against buying and selling of offices, and called a witness to shew on what occasion the bond was given, Lord Holt is said to have refused his evidence, because it appeared, that he was privately intrusted to make the bargain and to keep it secret. But the principle and authority of this case seem to have been over-ruled by that of Wilson v. Rastall and the later decisions on this subject.

(1) Gainsford v. Grammar, 2 Camp. N. P. C. 10.

(2) 4 T. R. 759. See also R. v. Sparkes, cited in Peake's N. P. C. 77, Du Barré v. Livette.

(3) Lee q. t. v. Birrell, 3 Campb. 337.

(4) Bull. N. P. 284.

The attorney of a party in the cause may be examined like any other witness, where he knew the fact before the retainer, that is, before he was addressed in his professional character (1); or, where he has made himself a party to the transaction (2); or, where he is questioned to a collateral fact within his own knowledge, or to a fact which he might have known without being intrusted as attorney in the cause (3). Thus, if he is a subscribing witness to a deed, he may be examined concerning the execution (4). So, if there be a question about an erasure in a deed or will, he may be asked, whether he had ever seen the instrument in any other state, for it is a fact within his own knowledge; but he ought not to be permitted to disclose any confessions, which his client may have made to him on the subject (5). So, if an attorney were present, when his client was sworn to an answer in chancery, he might be a witness on an indictment for perjury, to prove the fact of taking the oath, which is a fact not peculiarly within his knowledge as an attorney, and not committed to him in secresy (6). So, the attorney of one of the parties may be examined as to the contents of a written notice, which had been received by him in the course of the cause calling upon him to produce papers. (7)

On the same principle, in an action of debt upon a bond, the plaintiff's attorney was admitted by Lord Kenyon to prove, that the bond had been given on an usurious consideration (8). And, where a person, (who had brought an action on a promissory note, which was afterwards compromised by the defendant,) had informed the attorney after the compromise, that there never had been any consi-

(1) Cuts v. Pickering, 1 Ventr. 197. Lord Say and Seale's case, 10 Mod. 40.; Bull. N. P. 284. S. C. 4 T. R. 759.

(2) Duffin v. Smith, Peake N. P. C. 108. Robson v. Kemp. 5 Esp. N. P. C. 52. Cowp. 845.

(3) Bull. N. P. 284. Per Ld. Mansfield C. J. in Duchess of Kingston's case, 11 State Tr. 253.

(4) Doe d. Jupp v. Andrews, Cowp. 846. Robson v. Kemp, 4 Esp. N. P. C. 235; 5 Esp. N. P. C. 53. S. C.

(5) Bull. N. P. 284. 1 Ventr. 197.

(6) Bull. N. P. 284. Per Ld. Mansfield C. J. in Cowp. 846. R. v. Watkinson, 2 St. 1122, *contra*; but the reporter makes a *quære*.

(7) Spenceley v. Schullenberg, 7 East, 357.

(8) Duffin v. Smith, Peake N. P. C. 108.

deration for the note, the Court of King's Bench held that the attorney was compellable to disclose that circumstance, in an action brought to recover back the money (1). The communication, said Lord Kenyon, was not here made in contemplation of a suit. On the contrary, the purpose in view had been already obtained; and what was said by the client was from exultation, in having before deceived his attorney as well as his adversary.

(1) Cobden v. Kendrick, 4 T.R. 432.

CHAP. VII.

Of certain general Rules of Evidence.

IF no objection is made to the competency of a witness, and he is allowed to give evidence, the next question is, what evidence ought to be given; and in what manner is the witness to be examined. It will, therefore, now be necessary to inquire into certain general rules, which have been established, for the purpose of directing the testimony of witnesses, and for the more effectual attainment of the ends of justice. The consideration of these rules will form the subject of the present chapter; and in the next chapter some inquiry will be made into the mode of examining witnesses.

The order, in which it is proposed to consider the subject, is the following;

First, As to the number of witnesses to the proof of a fact;

Secondly, Of the nature of presumptive evidence;

Thirdly, That evidence is to be confined to the points in issue;

Fourthly,

Fourthly, That the affirmative of the issue is to be proved;

Fifthly, That the substance only of the issue need be proved;

Sixthly, That the best evidence is to be given, which the nature of the case admits;

Lastly, That hearsay evidence is not admissible.

Sect. I.

As to the Number of Witnesses, for the Proof of a Fact.

The general rule at common law is, that a single witness, if credible, is sufficient for the proof of any fact; in which respect the law of England differs from the civil law, where one of the maxims is, "unius responsio non "omnino audiatur." Lord Coke, indeed, has said in his Commentary (1), that "when a trial is by witnesses, as in the case of the challenge of a juror or summons of a tenant, the affirmation ought to be proved by two or more witnesses, but, where the trial is by verdict, there the judgment is not given upon witnesses, but upon the verdict, and upon such evidence as is given to the jury they find their verdict." But this distinction has been denied by Lord Holt (2), and the doctrine is said not to be warranted by the authorities cited in its support. By our law, however, the testimony of a single witness will not be sufficient in a few particular cases.

First, On an indictment for perjury, the evidence of one witness is not sufficient to convict the defendant; because then there would only be one oath against another. "To convict a man of perjury," said C. J. Parker, In case of perjury.

(1) Co. Lit. 6. *b.*

(2) Shotter v. Friend, Carth. 144.

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in the case of the Queen v. Muscot (1), "there must be strong and clear evidence, and more numerous than the evidence given for the defendant." It does not appear to have been laid down, that *two witnesses* are necessary to disprove the fact sworn to by the defendant; nor does that appear to be absolutely requisite. But, at least, one witness is not sufficient; and, in addition to his testimony, some other independent evidence ought to be adduced.

In case of treason.

Secondly, it was enacted, for the security of the subject, by stat. 1 Ed. 6. c. 12. § 22., that "No person shall be indicted, arraigned, condemned, or convicted for any offence of treason, petit treason, misprision of treason, unless the offender be accused by two sufficient and lawful witnesses, or willingly without violence confess the same." By the common law one witness would have been sufficient on the trial of those offences; and this is the first act of the legislature, where two witnesses are required. A similar provision is contained in the stat. 5, 6 Ed. 6. c. 11. § 12., which enacts, that "No person shall be indicted, arraigned, condemned, convicted, or attainted for any of the treasons or offences in that act mentioned, or for any treasons which then were or hereafter might be, unless the offender should be accused by two lawful accusers, who at the time of the arraignment should be brought, &c., unless the party arraigned should willingly without violence confess the same." So that two witnesses would at that time have been necessary in treasons relating to the coin of the kingdom. But an alteration in this respect was made by the stat. 1, 2 Ph. & Mary, c. 10. § 12., and 1, 2 Ph. & Mary, c. 11. § 3., which provided, that "in all cases of high treason concerning the current coin, or for counterfeiting the king's signet, privy seal, and great seal, or sign manual, and on trials for bringing counterfeit coin into the realm, or for any offence concerning the impairing, counterfeiting, or forging the cur-

(1) 10 Mod. 193.

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rent coin, the prisoners should be tried by the same evidence, as they were before the reign of Edward the Sixth (1)." In these cases, therefore, a single witness will now be sufficient; and it has been agreed by all the Judges, that these statutes extend to all offences, touching the impairing of the coin, which should afterwards be made treason (2). The stat. 7, 8 W. 3. c. 3., which relates only to such treasons as induce corruption of blood, enacts in the second section, that "No person shall be tried or attainted of that species of high treason, or of misprision of such treason, but by the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the *same* treason; unless the party indicted and tried shall willingly without violence in open court confess the same, or shall stand mute, or refuse to plead, or in cases of high treason shall peremptorily challenge above the number of thirty-five of the jury." And by the 4th section it is enacted, "If two or more *distinct* treasons of *divers kinds* are alleged in one indictment, one witness produced to prove one of the said treasons, and another witness to prove another of the said treasons, shall not be deemed to be two witnesses to the same treason within the meaning of this act." The stat. 39, 40 G. 3. c. 93. enacts, that "in all cases of high treason, when the overt act alleged in the indictment is the assassination of the king or any direct attempt against his life, or against his person, the prisoner shall be tried according to the same order of trial and upon the like evidence, as if he stood charged with murder." A conviction, therefore, in such a case may proceed on the testimony of a single witness.

The language of the statute of Edward 6. is, that "the offenders are to be accused by two witnesses," that is, two

(1) The like provision in statute 8, 9 W. 3. c. 26. s. 7. and stat. 6 G. 3. c. 53. s. 3.

(2) Gahagan's case, 1 Leach, Cr. C. 50. 1 East, P. C. 129. S. C.

witnesses

witnesses are required to prove the offence or overt act of treason; and the stat. of W. 3. expressly confines itself to the proof of the overt acts. With respect to all other acts, therefore, which are merely collateral, the rule of common law is not altered, and one witness is still sufficient. (1)

In courts of equity.

Thirdly, it is an established principle in courts of equity, that, on a bill praying relief, when the facts charged by the plaintiff, as the ground for obtaining a decree, are proved only by a single witness, and are *clearly* and *positively* denied by the answer of the defendant; the court will not grant a decree against the defendant (2). But where the evidence produced by the plaintiff is so far supported and corroborated by proof of concurring circumstances, as to outweigh the denial in the defendant's answer (3), (abstracting from the mind, that the evidence on the part of the plaintiff comes from a *disinterested* witness (4),) the former rule will not apply; and the evidence of a single witness, so strengthened and confirmed, will enable the court to decree against the answer. And there are many cases, in which the court has granted a decree against the defendant on the testimony of a single witness, when his testimony has not been clearly and positively contradicted by the answer. (5)

In ecclesiastical courts.

By the civil law, as was before observed, two witnesses are required for the proof of a fact; and such is the rule in ecclesiastical courts, whose practice is founded upon that law. But even in those courts, if a matter cognizable at common law arises incidentally in an ecclesiastical suit, (as, where a revocation of a will is pleaded, or payment of a legacy,

(1) Smith's case, Fost. 242.
(2) L'Neve v. L'Neve, 1 Ves. 64. 3 Atk. 646. S.C. 1 Ves. 97. 125. 2 Ves. jun. 243. East Ind. Comp. v. Donald, 9 Ves. 282, 3.
(3) Walton v. Hobbs, 2 Atk. 19. Janson v. Rany, ib. 140. Pember v. Mathers, 1 Bro. Ch. C. 52. Toole v. Medlicott, 1 Ball & Beatty, 403. Biddulph v. St. John, 2 Sch. & Lef. 521.
(4) 9 Ves. 283.
(5) 3 Atk. 650. 1 Ves. 66. 97. 12 Ves. 80.

gacy, or plené administravit, and the like,) the proof ought to be according to the principles and courts of the common law; and if they disallow the plea, because it is proved only by a single witness, they may be controlled by a prohibition. (1)

Sect. II.

Of the Nature of Presumptive Evidence.

Presumptive evidence.

Evidence consists either of positive or of presumptive proof. The proof is positive, when a witness speaks directly to a fact from his own immediate knowledge; and presumptive, when the fact itself is not proved by direct testimony, but is to be inferred from circumstances, which either necessarily or usually attend such facts (2). It is obvious therefore, that a presumption is more or less likely to be true, according as it is more or less probable, that the circumstances would not have existed, unless the fact, which is inferred from them, had also existed; and that a presumption can only be relied on, until the contrary is actually proved. In order to raise a presumption, it cannot be necessary to confine the evidence to such circumstances alone, as could not have happened, unless they had been also attended by the alleged fact, — for that in effect would be to require in all cases evidence amounting to positive proof; — but it will be sufficient to prove those circumstances, which *usually* attend the fact. If the circumstantial evidence be such, as may afford a fair and reasonable presumption of the facts to be tried, it is to be received and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue (3).

(1) Sir W. Juxon v. Lord Byron, 2 Lev. 64. Richardson v. Disborow, 1 Ventr. 291. Shotter v. Friend, Carth. 142. 1 Ld. Ray. 221. Cowp. 424. Com. Dig. tit. Prohibition, (F. 13.) and (G. 23.)

(2) Gilb. Ev. 142.

(3) 2 H. Bl. 297.

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However, for the purpose of trying the weight and effect of such presumptive proofs, it will often be of the utmost consequence to consider, whether any *other* fact happened, which might have been attended by the same circumstances, and with which of the facts they are most consistent.

It has been very justly observed (1), that when the proofs are dependant on each other, or when all the proofs are dependant upon one, the number of proofs neither increase nor diminish the probability of the fact; for the force of the whole is not greater than the force of that, on which they depend; and if this fails, they all fall to the ground. But when the proofs are distinct and independant of each other, the probability of the fact increases in proportion to the number of the proofs; for the falsehood of one does not diminish the veracity of another.

Pr. Ev. of legitimacy.

The fact of the birth of a child during a lawful marriage is primâ facie evidence of its legitimacy. Formerly the rule was so strict, that children were presumed to be legitimate, unless the husband had been out of the kingdom during the whole time of gestation; but this doctrine has been long exploded. The general principle, to be deduced from the authorities on this subject, as it was laid down and confirmed by the case of the King v. Luffe (2), appears to be this, that where there are circumstances, which shew an impossibility that the husband could be the father, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, or from his continued absence, the presumption is at an end, and the child will be deemed illegitimate. In an earlier case (3), the court of King's Bench held, that there was no necessity to prove the *impossibility*, if the other circumstances of the case tended strongly to repel the presumption

(1) Beccaria, ch. xiv.
(2) 8 East, 193, 206.
(3) Goodright, dem. Tompson, v. Saul, 4 T. R. 356.

sumption of access. And this point has been since established by the opinion of the Judges in the case of the Banbury claim of peerage (1), in which it was held, that, where the husband and wife are not proved to be impotent, and have had opportunity of access to each other during the period, in which a child could be begotten and born in the course of nature, the presumption of legitimacy arising from the birth of the child during wedlock may be rebutted by circumstances inducing a contrary presumption: and the fact of non-access (that is, the non-existence of sexual intercourse,) as well as the fact of impotency, may always be lawfully proved by means of such legal evidence, as is strictly admissible in every other case, where a physical fact is to be proved. It has been held, that, in the case of a divorce *à mensâ et thoro*, a child born after such a separation is presumed to be illegitimate (2); in this case, therefore, the party, who asserts the child's legitimacy, will have to prove access.

A receipt for rent due on a certain day is strong presumptive evidence, that the former rents have been regularly paid down to that time. But it is only presumptive evidence; and the other party will be allowed to prove the contrary. "If a man gives a receipt for the last rent, says Ch. B. Gilbert (3), the former is presumed to be paid, because he is supposed first to receive and take in the debts of the longest standing; especially, if the receipt be in full of all demands, then it is plain there were no debts standing out; and if this be under hand and seal, the presumption is so strong, that the law admits of no proof to the contrary." So in an action for work and labour done for the defendant, proof that the plaintiff and other workmen, who were employed by the defendant, came regularly to receive their wages from the defendant, whose practice was to pay every week, and that the plaintiff had not been heard to complain — Of payment.

(1) 2 Selw. N. P. 681. MS.
(2) Parishes of St. George v. St. Margaret, 1 Salk. 123.
(3) Gilb. Ev. 142.

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of non-payment, would be presumptive evidence of payment to meet a stale demand. (1)

So in the case of a bond, which has been suffered to lie dormant for 20 years, payment may be presumed. Forbearance for so long a time unexplained is a circumstance, from which the jury may and ought to infer, that the bond has been satisfied (2). It has been sometimes said, that payment may be presumed even within that time (3); but this is to be understood with reference only to those cases, where there has been some other evidence to raise such a presumption, as, the settling of an account in the intermediate time, without noticing any demand upon the bond (4). However, the presumption arising after such a lapse of time may be repelled by proof of the defendants' recent admission of the debt; or by proof of the payment of interest within 20 years, which is an acknowledgment that the principal sum was not then discharged (5); or the presumption may be answered by proof of other circumstances, explaining satisfactorily why an earlier demand has not been made.

With respect to the *proof* of the payment of interest, it may be proved by shewing an indorsement to that effect in the hand-writing of the obligor, or made by his direction; or, by an indorsement in the hand-writing of the obligee, provided it appears by extrinsic evidence, that the indorsement was made within 20 years after the money was payable, that is, at a time when it was against the interest of the obligee to make such a written acknowledgment, unless the fact were true. This point, respecting an indorsement by the *obligee*, was determined in the case of Searle v. Lord

(1) Lucas v. Novosilienski, 1 Esp. N. P. C. 296.

(2) 6 Mod. 22. 4 Burr. 1963. Oswald v. Legh, 1 T. R. 270.

(3) 1 Burr. 434. Cowp. 109.

(4) 1 T. R. 271, 2. 4 Burr. 1963. Colsel v. Budd, 1 Campb. N. P. C. 27.

(5) 1 T. R. 270.

Barring-

Barrington (1), in an action by the administrator of an obligee against the administrator of the obligor. The defendant pleaded *solvit ad diem*, and insisted on the length of time as presumptive evidence, that the money had been paid; in answer to this, the plaintiff offered in evidence an indorsement in the hand-writing of the obligee, who died about 13 years after the date of the bond, this indorsement stating that interest had been paid 10 years after the date; and after much argument it was at length determined on a writ of error, that the evidence was admissible. It is not very easy to perceive the principle upon which this decision was founded. No reason is given for the admissibility of the evidence in Lord Raymond's report. According to the report in Strange, the three Judges of the court of King's Bench, who differed in opinion from the Chief Justice on the first trial, held that the indorsement ought to have been left to the jury, "because the jury might "have reason to believe, that it was done with *the privity* "*of the obligor*, and the constant practice is for the obligee "to indorse the payment of interest; and that for the sake "of the obligor, who is safer by such an indorsement, than "by taking a loose receipt." It appears indeed to be certain, that if extrinsic evidence had been produced, shewing the indorsement to have been made with *the privity of the obligor*, such evidence would have made it clearly admissible as in effect the *obligor's* indorsement; but perhaps it may deserve consideration, whether such extrinsic evidence was not previously necessary, before the indorsement could be received in evidence; for the objection against receiving the indorsement of the obligee, which the Chief Justice on the first trial thought decisive, was this, that the endorsement being in the hand-writing of the obligee, who

(1) 2 Stra. 826; 2 Ld. Ray 1370. S. C. Pratt, C. J. rejected the evidence on the trial; but the other Judges of K. B. held it to be admissible. On a second trial, many years after, Lord Raymond C. J. received the evidence; on which a bill of exceptions was tendered and signed. On writ of error in the Exchequer-chamber, five Judges thought it admissible, and two Judges were of the contrary opinion. This judgment was afterwards affirmed in the House of Lords.

had the bond in his custody, and might enter what he pleased upon it, could not be evidence for him nor for his administrator, though it would have been good evidence against him. The general principle certainly is, that a person cannot make evidence for himself; what he says or writes for himself cannot be evidence in support of his right, and consequently cannot be evidence for his representative claiming in his right or place; what a party has said or done may be evidence *against* himself, but it can only be admitted to restrain, not to advance his interest (1). And although there are a variety of cases, in which written entries by deceased persons against their interest have been admitted as evidence of the fact there stated, (as will appear afterwards in treating of the subject of hearsay,) it is to be observed that in those cases the entries were given in evidence, not in favour of the persons who had made them, nor for their representatives, but were produced on the part of third persons, who had no concern whatever in making them. Lord Chancellor Hardwicke in one of his judgments has made some observations on this case of Searle v. Lord Barrington (2); he laid down the general principle as above stated, and then added, "As to the case of in- "dorsements by an obligee of the payment of interest, it "does not at all prove the original right to the thing in "demand. Indorsements by an obligee of the payment "of interest on a bond are evidence *against* that obligee "originally in the nature of the thing; and the other is only "consequential evidence to take it out of the presumption "arising from length of time, which he ought to have "the benefit of on the other hand; and in that case, I take "it, the indorsements were made and bore date within the "twenty years; for if those indorsements were dated after "the expiration of twenty years, though they were evi- "dence of the actual payment of interest after that time, "they would not be evidence to take it out of that pre- "sumption."

(1) 2 Ves. 42, 3. 5 T. R. 123.

(2) Glynn v. Bank of England, 2 Ves. 43.

"sumption (1)." Upon the whole, then, the case of Searle v. Lord Barrington must be considered as an exception to the general principle of evidence, and as having been decided on its own peculiar circumstances; and though on the authority of that case, which underwent so much revision, an indorsement by the *obligee* should be considered admissible in evidence, there ought certainly to be some extrinsic evidence to prove that the indorsement was made within the 20 years. Such evidence was produced in that case; it being there proved, that the obligee, who made the indorsement, died about 13 years after the date of the bond. It will not be sufficient, that the indorsement bears date on a certain day, and purports to have been then made. That of itself proves absolutely nothing. The danger is, that the obligee may be induced to manufacture evidence for himself, for the purpose of encountering the presumption, which might be formed against him after his forbearance for such a length of time. Such an indorsement therefore ought to be proved by extrinsic evidence to have been written at a time, when its effect was clearly in contradiction to the writer's interest (2). Further, it should seem, if the defendant produces evidence of the payment of the principal sum and interest, the plaintiff cannot be allowed to encounter that evidence by an indorsement in his own hand-writing, purporting that interest was paid on a subsequent day; — for supposing the fact to be true, that the bond has been satisfied by payment, it would obviously be his interest to make such an indorsement, which he might afterwards use as evidence in an action upon the bond.

Although it may be presumed that a bond has been satisfied after a forbearance for 20 years unexplained on the part of the obligee, yet it has been held, that, in the case of a quit-rent claimed by the lord of a manor, proof by the tenant, that no demand had been made upon him for near

(1) This point was so ruled by Lord Raymond in Turner v. Crisp, 2 Str. 827.

(2) See Rose v. Bryant, 2 Campb. 321; and Hoare and another v. Coryton, 4 Taunt. 560.

40 years, was not a sufficient ground for presuming a release or extinguishment; and that no such presumption could be raised within less than 50 years, which is the period fixed by the statute of limitations (1). A bond may be discharged by payment, and on account of the difficulty of proving this fact after a length of time, it is reasonable to presume it without positive proof: but for the extinguishment of a quit-rent a deed is necessary, and it would be too much to presume, that the lord of the manor has executed such a deed, from the mere fact of his not having demanded payment of the quit-rent. "A presumption," said Mr. Justice Aston, "from mere length of time, which is to support a right, is very different from a presumption to defeat a right; here the presumption is to defeat the right of the lord to a small payment within the 50 years limited by the statute; and therefore upon mere length of time unaccompanied by other circumstances, such a limitation ought not to be altered, and another set up."

Of property. Possession is primâ facie evidence of property. Possession with an assertion of property, or even possession alone, gives the possessor such a property as will enable him to maintain an action of trover or trespass against a wrong-doer (2). Thus, it has been held, that an agister of cattle may maintain trespass against a person for wrongfully taking them away (3). And the principle applies to criminal as well as civil cases. On a prosecution for larceny, the property of the goods may be laid in the person who had possession at the time; and proof of the mere possession will support the indictment. This has been determined in the case of an agister of cattle (4), and in the case of a coachman, who drove the stage-coach by which the goods were sent (5). So, (to give another example in a civil case,) in an action on a policy of insurance (6), the mere

(1) Eldridge v. Knott, Cowp. 214.
(2) Armory v. Delamirie, 1 Str. 505. Graham v. Peate, 1 East, 244. Sutton v. Buck, 2 Taunt. 302.
(3) 2 Roll. Abr. tit. Trespass, (M).
(4) Woodward's case, 2 East, P. C. 653.
(5) Deakin's case, 2 East, P. C. 653.
(6) Robertson v. French, 4 East, 130.

fact

fact of possession of a ship by the plaintiff as owner is sufficient primâ facie evidence of ownership; and though it should appear on the cross-examination of one of the witnesses for the plaintiff, that the plaintiff derived his ownership under a bill of sale executed by the witness himself, it would not on that account become necessary for the plaintiff to produce that bill of sale. The proof of possession will be sufficient without the aid of any documentary proof, unless such further evidence is rendered necessary in consequence of some contrary proof on the other side.

There are many cases, not within the statute of limitations, where courts of justice, from a principle of quieting possession, have held, that juries ought to presume the most solemn instruments to support a length of possession. The rule of presumption is applied, wherever the possession of the party is rightful, to invest that possession with a legal title (1). Even in the case of the crown, which is not bound by the statutes of limitation, a charter or grant may be presumed from great length of possession. (2) Of grants, &c.

An endowment of a vicarage may be presumed from the long and continued possession of first fruits and tenths (3). So, long and uninterrupted usage will support a modus decimandi. It is evidence from which the jury may presume an agreement, beyond time of memory, between the land-owners and all the parties, whose consent was necessary to give it effect. But such usage will not of itself be sufficient to support a modus *de non decimando*. And though immemorial custom is evidence of the other kind of modus, and is in general a ground for presuming deeds even against the crown; yet in the particular instance of a composition for tithes, it is settled, that where the deed cannot be produced, some evidence must be given referring to the

(1) 8 East, 263.

(2) Bedle v. Beard, 12 Rep. 5. Mayor of Kingston v. Horner, Cowp. 102. 3 T. R. 151. 8. 7 T. R. 492. 11 East, 488.

(3) Crimes v. Smyth, 12 Rep. 4. 2 Gwill. 514. 716. 732.

deed, or shewing that it did exist, independent of mere usage. And the reason why this has been so held is stated to be, that if it were otherwise, the church would be defrauded, and every bad modus turned into a good composition. "The presumption of a deed from long usage is for the furtherance of justice and for the sake of peace, when there has been a long exercise of an adverse right. For instance, it cannot be supposed, that any man would suffer his neighbour to obstruct the light of his windows and render his house uncomfortable, or to use a way with carts and carriages over his meadow for 20 years successively, unless some agreement had been made between the parties to that effect, of which the usage is evidence. But with respect to a composition for tithes, the same reason does not obtain, because temporary agreements are made and continued for the convenience of parties during a succession of incumbents: there is no exercise of any adverse right, which is generally deemed necessary to raise the presumption." (1)

Upon the same principle, uninterrupted enjoyment of an easement for 20 years, or upwards, is strong evidence of a right of enjoyment, from which juries are directed by the court to presume a conveyance or agreement; as, in an action on the case for obstructing the plaintiff's lights (2), or in the case of a market regularly kept above 20 years (3). So, a faculty from the ordinary may be presumed from the long uninterrupted usage of a pew in a church, claimed as appurtenant to a messuage (4). So, an adverse enjoyment of a way over another person's land for above 20 years is a strong ground for the jury to presume a grant, although about 26 years ago the way was extinguished by an award under

(1) Knight v. Halsey, in error, 2 Bos. & Pull. 206. The first case on this subject seems to have been in 1778, Haywood v. Nichols, 3 Gwill. 1120. The cases are collected in Bennet v. Neale, 1 Wightw. 324. in Mr. Baron Wood's argument.

(2) Lewis v. Price, reported in Mr. Serjt. Williams's edition of Saund. 2 vol. 175. a; Dougal v. Wilson, id. 175. b; Darwin v. Upton, id 3 T. R. 159.

(3) Holcroft v. Heel, 1 Bos. & Pull. 401.

(4) Rogers v. Brooks, 1 T. R. 431. (a). Griffith v. Matthews, 5 T. R. 296. S.

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an inclosure act (1). If indeed the party had asserted his right to be grounded on the award, this would shew that the way was used by mistake; but unless it could be clearly referred to something else besides adverse possession, the jury would probably be directed not to consider small circumstances as raising a presumption, that the possession arose otherwise than by grant.

Adverse possession for a shorter period than 20 years will not of itself afford a ground for such a presumption; and there ought to be some other evidence in support of the right (2). However, a licence may be presumed within that time, though in general a grant cannot; as, in an action of ejectment to recover part of a waste inclosed by the defendant, where it was proved that the steward of the lord of the manor had from time to time seen the inclosure, which had been nearly 13 years, without making any objection, this was held to be evidence from which the jury might presume a licence from the lord. (3)

In the cases which have been mentioned, the usage for 20 years was considered to be strong presumptive evidence of a grant or agreement. But it is only *presumptive* proof; and therefore evidence is admissible to repel such a presumption; as, by shewing that the usage was limited, or modified, or bad in its commencement, or that it clearly originated in a mistake (4). In the case of Darwin v. Upton (5), which has been cited, where the effect of this kind of evidence was much considered, Lord Mansfield said, "The enjoyment of lights with the defendant's acquiescence for 20 years is such decisive presumption of a right by grant or otherwise, that, unless contradicted or ex-

(1) Campbell v. Wilson, 3 East, 294. 302. Keymer v. Summers, Bull. N. P. 74. Carr v. Heaton, 3 Gwill. 1262. As to a public right of way, by a presumed dedication on the part of the owner of the soil, see the case of the Trustees of the Rugby Charity v. Merryweather, 11 East, 375. n. R. v. Lloyd, 1 Campb. N. P. C. 260.

(2) 6 East, 215. 4 Burr. 1963. Cotterel v. Griffiths, 4 Esp. N. P. C. 69.

(3) Doe, dem. Foley, v. Wilson, 11 East, 56.

(4) 3 East, 300, 2.

(5) 2 Saund. 175. c.

plained,

plained, the jury ought to believe it. But it is impossible that length of time can be said to be an *absolute bar* like a statute of limitation; it is certainly a *presumptive bar*, which ought to go to the jury." The other Judges also were strongly of the same opinion. In the case of Holcroft v. Heel, indeed (1), Ch. J. Eyre who tried the cause held that an undisturbed possession of a market by the defendant for 23 years was a *bar* to an action brought by the plaintiff the grantee of a neighbouring market, and therefore nonsuited the plaintiff; and the Court of Common Pleas seem, from the report, to have been of the same opinion. But this case has been since explained by a learned Judge who was counsel in the cause (2); and it appears to have been the opinion of the Court, that the adverse possession was such strong evidence, that the Chief Justice ought to have *left it to the jury* to find a grant of the market from the crown; but as the court also intimated, that if the cause were to be tried again upon the same facts, the jury would be so directed, the plaintiff's counsel declined pressing for a new trial. So that this case appears not to be inconsistent with the other authorities, which determine, that such a continued possession is only *presumptive* evidence of a grant.

The usage, which is supposed to be founded on a grant or agreement, determines also the extent of the supposed grant (3). The right granted is considered to be commensurate with the right enjoyed. A person who has enjoyed a limited right cannot lawfully enlarge it to the detriment of others; and, in case of such enlargement, those who are prejudiced may lawfully obstruct the use in the *newly acquired* part; but still he will be entitled to the enjoyment of his *former* right, not only to the same extent, but in the same specific manner (4). So, if a person has a way for carriages from D. to B. over another man's close, and pur-

(1) 1 Bos. & Pull. 400.
(2) 3 East, 298. 302.
(3) 14 East, 339, 340.

(4) Chandler v. Thompson, 3 Campb. 80. And see Martin v. Goble, 1 Campb. 320. Bealey v. Shaw, 6 East, 208.

chases

chases land adjoining to B., he cannot use the way with carriages to the adjoining land, though he comes first to B. and so to the adjoining land; for this way may be prejudicial to the other person's close (1). The continued use and enjoyment of a private way for carriages does not *necessarily* imply a right to use it as a drift-way, though the one has been often understood as including the other (2). However, it has been held that the use of a carriage-way is evidence of a right of way for all kinds of cattle, more especially, if some species of cattle have been usually driven along the way; and that it will be a question for the jury to determine, from the nature and situation of the premises and other circumstances, whether it is more probable that the grant included both rights of way, or that one of them was excluded.(3)

The principle above stated must always be understood with this qualification, that the possession, from which the party would presume a grant of the easement, was with the knowledge of the person seised of an estate of inheritance. If a tenant for years or for life gives a licence to another to enjoy an easement on his lands for above 20 years without interruption, this will not affect the person in reversion or remainder; but, on the determination of the particular estate, he may dispute the right to the easement, and the length of possession will not be evidence against him to presume a grant, unless it can be shewn that he acquiesced (4). So, where a person made windows in his house, and had them for above 20 years, without any interruption from the occupier of the opposite premises, who occupied them under a lease, the Court of King's Bench held, that the possession of such an easement would not affect the landlord on the determination of the lease, and that he would not be liable to an action for raising the height of his own premises, and thereby obstructing the

(1) Roll. Ab. 391. tit. Chimin, Art. 3. Laughton v. Ward, 1 Lutw. 111.

(2) 1 Taunt. 284, 5.

(3) By Mansfield, C. J. and Chambre, J. in Ballard v. Dyson, 1 Taunt. 279.

(4) Bradbury v. Grinsel, 2 Saund. 175. *d.* in note.

light

light through the new windows (r). "It is true," said Mr. Justice Le Blanc in this case, "that presumptions are sometimes made against the owners of land during the possession and by the acquiescence of their tenants, as in the instances of rights of way and of common; but that happens, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of the landlord as well as his own, and to make common cause with him; but the same cannot be said of lights put out by the neighbours of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake."

In criminal cases.

Presumptive or circumstantial evidence, if admissible in civil cases, must obviously be equally admissible in criminal prosecutions; for, whether the remedy be of a civil or criminal nature, the modes of reasoning and of drawing conclusions from facts must necessarily be the same. Indeed, it must very commonly happen in some of the worst species of crimes, that this is the only kind of evidence which can be resorted to; and it will often be the most satisfactory and convincing, that can be produced.

Where an act is in itself unlawful, it is presumed to be criminal, until the contrary appear. Thus, on a charge of murder, malice is presumed from the fact of killing: and if there are any circumstances of accident, necessity, or infirmity, of which the prisoner would avail himself in excuse or extenuation, they ought to be proved by the prisoner in his defence, unless they arise out of the evidence produced against him. On an indictment for larceny, proof that the stolen goods were found upon the prisoner is presumptive evidence against him of his having stolen them, so as to call upon him for his defence; and may be sufficient to convict him, if no facts appear in evi-

(r) Daniel v. North, 11 East, 372.

dence

dence to repel that presumption. This kind of evidence is frequently strengthened materially by other circumstances, as by proof that about the time of the offence the prisoner was near the spot from which the goods were taken, or that he gave some false account respecting the goods on being charged with the crime, or endeavoured to conceal them, or perhaps tried to prevent an inspection, or by some other proof of suspicious circumstances in his behaviour (1). On the other hand, the inference arising from the mere fact of possession will often be much weakened, if any considerable time has elapsed between the loss of the property and the finding it again, or if the property was from its nature likely to pass in the interval through many hands; especially, where the prisoner betrayed no appearance of guilt at the time of his apprehension.

A presumption of fact is in some cases made a presumption of law. Thus in the law of treason, an intention to kill the king may be reasonably inferred from a conspiracy to sieze his person and imprison him. "Experience has shewn," says Mr. Justice Foster (2), "that the distance is very small between the prisons and the graves of princes." This is a presumption of fact. But it is fully settled by the best authorities, that such a conspiracy is in law an overt act of compassing the king's death, and in itself a substantive act of high treason within the statute of Edward the third. The same observation applies to other acts, which have a less immediate and direct tendency to endanger the king's life, as, entering into measures in concert with foreigners in order to effect an invasion of the kingdom; this also is an overt act of compassing the king's death (2). "It is a presumption of fact so obvious and so undeniable, that the law has adopted it, and made it a pre-

(1) See other cases of presumptive evidence, in the next section; and see Index, tit. Presumption.

(2) Fost. 196.

sumption

sumption of law." So, on an indictment for the murder of a bastard child, the concealment of the death by the mother is a strong circumstance of suspicion against her, if the child is proved to have been born alive. But, unless that is proved, the mere fact of concealment is in its nature equivocal. However, by the statute of 21 J. 1. c. 27. the burthen of proof was cast upon the mother; and unless she proved the negative, namely, that the child was not born alive, that statute did in effect make the concealment conclusive evidence of the murder. This act has been since repealed by the statute 43 G. 3. c. 58. s. 3.; by which the endeavour to conceal the birth is subject to a lighter punishment. *

Sect. III.

Evidence is to be confined to the Points in Issue.

As the sole object and end of evidence is to ascertain the truth of the several disputed facts or points in issue on the one side or on the other, no evidence ought to be admitted to any other point. Thus in an action of assumpsit, the defendant under the general issue of non assumpsit may give in evidence any thing which shews, that the plaintiff has not a good cause of action, or that nothing is due (1), as, performance, or payment; or may shew a release (2), or accord and satisfaction (3), as a legal excuse for the non-performance; or that the contract was different from that

Non assumpsit.

(1) Bull. N. P. 152.
(2) Bull. N. P. ib. 2 Campb. 558.
(3) Paramore v. Johnson, 1 Lord Ray. 566. 12 Mod. 376. S. C.

* The 4th section enacts, "that it may be lawful for the jury, by whose verdict any prisoner charged with such murder shall be acquitted, to find, in case it shall so appear in evidence, that the prisoner was delivered of issue of her body, which if born alive would have been bastard, and that she did by secret burying or otherwise endeavour to conceal the birth thereof, and thereupon it shall be lawful for the Court to adjudge, that such prisoner shall be committed to the common gaol or house of correction for any time not exceeding two years."

 stated

stated (as, that it was made with the plaintiff and other persons not named in the action (1), or with one of the plaintiffs alone) (2); or may disaffirm the contract by shewing, that the plaintiff, who sues as a feme sole, was married at the time of the contract; or, that the defendant, who is sued as a feme sole, was then married; or, that the plaintiff was a bankrupt at the time (3); or may avoid the contract by shewing that it was usurious (4), or founded on a gaming transaction (5), or that the defendant was an infant at the time of making the promise (6). But the defendant cannot under the plea of non assumpsit shew any matter, that would not go to the gist of the action, but merely to discharge it, as the statute of limitations (7). And though it should appear on the face of the declaration, that the cause of action did not arise within six years before the commencement of the action, yet the defendant can only take advantage of this, by pleading the statute. Nor will the defendant be allowed to prove under the general issue, that the contract was not with himself alone, as stated in the declaration, but jointly with other persons still living (8); for proof that another contracted is not evidence, that the defendant himself did not contract. Such an objection can only avail, when the fact is pleaded in abatement. And although it should appear on the evidence produced on the part of the plaintiff, that other persons are liable as joint contractors with the defendant, this is no variance, and the plaintiff will be entitled to recover (9). But the plaintiff, in an action for money had and received by the defendants, cannot give evidence of money received by the defendants and another partner *since deceased;* for, in such a case there cannot be a plea in abatement, as if the other partner were still alive. (10)

(1) Leglise v Champante, 2 Str. 820.
(2) Wilsford v. Wood, 1 Esp. N.P.C. 183.
(3) Bull. N. P. 153.
(4) 1 Str. 498. Bull. N. P. 152.
(5) 1 Ld. Ray. 89.
(6) 1 Salk. 279. Bull. N. P. 152. Gilb. Ev. 163.
(7) Bull. N. P. 152.
(8) Rice v. Shute, 5 Burr. 2611. Abbot v. Smith, 2 Blac. Rep. 946. Cowp. 832.
(9) Germain v. Frederick, and Evans v. Lewis, 1 Saund. 291. *c. d.* in note.
(10) Spalding v. Mure and others, 6 T. R. 363. 5.

The

Non est factum.

The rule, which has been just laid down with respect to joint contracts, either written or by parol, applies also to the case of joint bonds. If an action is brought against one obligor alone, who pleads non est factum, the plaintiff may maintain his action, notwithstanding that on the production of the bond there appears to be a joint obligor (1). The plea of non est factum puts in issue, whether it be the defendants' deed at the time of pleading. Evidence is therefore admissible under this plea, to shew that, at the time of pleading, the deed was by the rules of common law absolutely void (2); as, that the defendant was at the time of the execution a lunatic (3), or a married woman (4), or that he was made to sign it when so drunk as not to know what he did (5), or that the deed was delivered as an escrow on a condition not performed (6). For the same reason the defendant may shew, that, after the delivery of the deed and before the time of bringing the action, the deed has been altered in a material point by some addition, or rasure, or interlineation, &c.; for then, at the time of pleading, it was not the defendant's deed, but absolutely void (7). And the rule is the same, whether such a material alteration was made by the obligee, or by a stranger without his privity; the deed is void in either case. It was resolved in Pigot's case (8), that if the obligee alters the deed, though in words not material, the deed is void; but if a stranger, without his privity, alters the deed in any point *not material*, it will not avoid the deed. The defendant, under the general plea of non est factum, cannot prove payment, or give in evidence a release, or accord and satisfaction; and if the deed is merely voidable, (as, by reason of his infancy, or for duress of his person,) he may plead such matter, and so avoid the deed; but cannot give it in evidence under the

(1) Whelpdale's case, 5 Rep. 119. Cabell v. Vaughan, 1 Saund. 291.

(2) Whelpdale's case, 5 Rep. 119.

(3) Yates v. Boen, 2 Str. 1104.

(4) Anon. C. 12 Mod. 609. Lambert v. Atkins, 2 Campb. 272. Bull N. P. 172.

(5) Bull. N. P. 172.

(6) 5 Rep. 119. *b.* Bull. N. P. 172. Stoytes v. Pearson, 4 Esp. N.P.C. 255.

(7) 5 Rep. 119. *b.* Pigot's case, 11 Rep. 27.

(8) 11 Rep. 27.

plea

plea of non est factum, for, at the time of pleading, it had not been avoided, and was his deed (1). Even in cases, where it is enacted by the legislature that the deed shall be void, (as, by stat. 9 Ann. c. 14. s. 1. for gaming, by stat. 5, 6 Ed. 6. c. 16. s. 2, 3. for sale of office, by 12 Ann. st. 2. c. 12. s. 2. for simony, and by stat. 13 Eliz. c. 8. for usury,) the defendant cannot take advantage of this under the plea of non est factum, but ought to plead the special matter. (2)

In an action of trespass for assault and battery, the defendant cannot give in evidence, under the general issue, that he was first assaulted by the plaintiff, except in mitigation of damages: but with that view the evidence is admissible. In trespass *quare clausum fregit*, evidence of title and of right of possession is admissible under the general issue; as, a demise from the owner of the land (3); or, that the plaintiff's interest in the premises, which he had occupied under the defendant, had expired (4): or the defendant may prove, that at the time of the supposed trespass the freehold and right of possession were in a third person, and that he entered by his command (5). Such evidence falsifies the declaration, by shewing that the defendant did not break the close, as is stated in the declaration (6). But the defendant under this plea cannot prove a licence from the plaintiff (7), or defect of the plaintiff's fences (8), or right of common (9), or right of way (10), or other easement (11). Formerly, he could not have proved that he entered to take a distress for a rent-charge (12); but this evidence is now admissible under the general issue, by stat. 11 G. 2. c. 19. s. 21. In trespass for taking goods, the defendant may prove under the general issue, that the

Not guilty, in trespass.

(1) 5 Rep. 119.
(2) 5 Rep. 119.
(3) Dodd v. Kyffin, 7 T. R. 354.
(4) Argent v. Durrant, 8 T. R. 403.
(5) Diersley's case, 1 Leon. 301. 8 T. R. 403.
(6) Gilb. Ev. 221.
(7) Gilb. Ev. 216. 2 T. R. 166, 8.
(8) Co. Lit. 283. *a*. Gilb. Ev. 216.
(9) Id.
(10) Gilb. Ev. 217. 220.
(11) Hawkins v. Wallis, 2 Wils. 173.
(12) Co. Lit 283. *a*.

goods were put into his custody as pound-keeper, and that as such he detained them. (1)

Issue on custom.

When a right is claimed by custom in a particular manor or parish, proof of a similar custom in an adjoining parish or manor is not admissible evidence. In the Duke of Somerset's case (2), Lord Ch. J. Raymond said, he had always looked upon it as a settled principle in the law, that the customs of one manor should not be given in evidence to explain the custom of another manor; for, if this kind of evidence were to be allowed, the consequence seems to be, that it would let in the custom of one manor into another, and in time bring the customs of all manors to be the same. And, in addition to this argument of inconvenience, the objection taken to the evidence in that case, namely, that it was inapplicable to the point in dispute, appears to be very strong; customs being different in different manors, and in their nature distinct. Unless therefore some connection or relation is proved to have existed between them, as, by shewing that they were all formerly holden under the same lord, or that the one manor was anciently parcel of the other manor (3), such evidence is not admissible.

But several cases appear to have determined this point, that, where all the manors within a certain district are held by the same peculiar tenure, and a question arises in any one of them upon an incident to the tenure, evidence may be given of the usage, which prevails in any of the other manors within the district. The first reported case of this kind is Champian v. Atkinson (4), where the question was, whether a general fine was due to an infant preceding lord during his minority: and the defendants were allowed to give in evidence upon the trial of this issue, that other ad-

(1) Padkin v. Chancellor and others, Cowp. 476.

(2) D. of Somerset v. France, 1 Str. 661. Ruding v. Newel, 2 Str. 957. Furneaux v. Hutchins, Cowp. 807. By Buller, J. in Noble v. Kennoway, 2 Doug. 512. S. P., by Wood, B. in Doe dem. Foster v. Sisson, 12 East, 63. S. P. 3 Gwill. 965.

(3) Moulin v. Dalison, Cro. Car. 484.

(4) 3 Keb. 90., on Tr. at bar.

joining

joining manors had the same custom, not to pay to the lord before he attained his full age: and similar evidence was there said to have been received, on a question of copyhold tenure, between certain manors in Middlesex. On the authority of this case of Champian v. Atkinson, the Duke of Somerset's case (1) was principally decided. On a trial at bar in that case, where the issue was, whether a general fine was due from the tenants of certain manors in Cumberland to the Duke as next admitting lord, the Court after much argument admitted evidence, that the same fines had been paid in similar cases to the lords of other manors. Lord Ch. J. Raymond and Reynolds J. laid down the general rule as above stated, and were strongly against admitting the evidence; but afterwards agreed to receive it, on the authority of the precedent in Keble, and of cases said to have been so ruled on the northern circuit. Fortescue J., the only other Judge present, thought the evidence admissible, and made a distinction between the *custom* and the *tenure* of a manor; and as the question there to be tried merely concerned the tenure of the plaintiff's manors, he was of opinion that it would be proper to inquire, what were the qualities that attended other estates holden by the same tenure. So in the case of Furneaux v. Hutchins, on a question relative to the custom of tithing (2), Lord Mansfield after laying down the general rule, that "proof of the custom in one parish is not evidence to affect another parish," adds this qualification, "unless the custom is laid as a general custom of the country." Thus, where half of a river belongs, by the constant custom of the country, to the lords of the manors on each side of the water, proof of the custom in one manor is evidence of the same customary right in another (3). It is evidence of a custom pervading one common district of manors.

(1) D. of Somerset v. France, 1 Str. 658. See also Lowther v. Raw and others, Fortesc. 44, 55, S. P., on appeal to the H. of Lords from the judgment of Lord Talbot, Ch.; Dean and Chapter of Ely v. Warren, 2 Atk. 189. S. P. See also Cowp. 807, 8.; and 1 Maule & Sel. 662.

(2) Cowp. 808.

(3) 1 Maule & Sel. 662.

In

In the cases which have been cited, proof of a general right over one entire district was admitted to explain and affect the rights of different persons in different parts. Upon the same principle, the late case of Sir Thomas Stanley v. White (1) was determined. This was an action of trespass for cutting down the plaintiff's trees; the defendant pleaded his soil and freehold in the close, upon which the trees were growing, &c.; the plaintiff replied, that the trees were his trees and freehold. It appeared on the trial, that the trees in question grew in a woody belt, of considerable extent, entire and undivided, which encircled the plaintiff's manor, and lay contiguous to a number of closes belonging to several owners, one of which closes was that of the defendant. Evidence was admitted of several acts of ownership, in different parts of the belt, by those under whom the plaintiff claimed, which had been acquiesced in by the owners of the adjoining land. And the Court of King's Bench afterwards, on a motion for a new trial, adjudged the evidence to have been properly admitted, as evidence of the general right through the whole extent of the inclosure.

The general rule, then, is, that a custom of tithing, &c. in one parish is not evidence of a custom in another. So in an action by a rector for tithes, where the point in issue is, whether there exists a modus of a certain sum of money for a particular farm in a township within the parish, the defendant will not, in general, be allowed to inquire, whether other farms in the same township are not subject to the same payment. Such an inquiry, however, may be very proper *on the other side*, in cross-examination, for the purpose of shewing that such payments cannot be a modus, consistently with the evidence which has been previously adduced. This was lately adjudged to be admissible in the case of Blundell v. Howard (2). The question there was not put by the *defendant* with a view of supporting the

(1) 14 East, 332.

(2) 1 Maul. & Sel. 292.

modus

modus set up by him; but was put by the *plaintiffs*, in order to shew, that this and similar payments by the occupiers of different tenements were merely portions of a sum in gross paid throughout the township by way of composition, and could not be a modus, since the ecclesiastical surveys, which had been produced on the part of the rector, were entirely silent as to any modus co-extensive with the township.

Proof of *other acts, &c.*

In the case of Hunter v. Gibson and Johnson (1), which was an action by an indorsee against the defendants as acceptors of an instrument purporting to be a bill of exchange, a question arose on the third count, which stated the bill to be *payable to bearer*, under the following circumstances: It appeared in evidence, that the name of the person mentioned as payee was merely fictitious, but this fact was not known to the plaintiff; and for the purpose of shewing, that the defendants, at the time of their acceptance, either knew the name in the bill to be fictitious, or that the defendants had given authority to the drawer to draw *the bill produced* payable to a fictitious person, the plaintiff proposed to prove, that the defendants had given a *general authority* to the drawer to draw bills of exchange upon them, to be made payable to fictitious persons, and evidence to this effect was produced; the counsel for the defendants objected to this evidence, on the ground, that it had no relation to the *particular bill in question*, and that the facts of any particular transaction could not legally be inferred from circumstances which applied wholly to *other* transactions. Lord Kenyon, who tried the cause, admitted the evidence; upon which, the counsel for the defendants tendered a bill of exceptions. The Court of King's Bench gave judgment for the defendant in error. A writ of error was then brought in the House of Lords; and the question on the admissibility of the evidence was referred to the judges. On this question there was a division among

(1) 2 H. Bl. 187. 288. 297. 295. See 7 East, 40.

the judges; but the majority of them being of opinion, that the evidence ought to have been received and left to the jury, the judgment below was affirmed. (1)

In trespass for taking goods, the plaintiff can only prove the taking of such goods, as are mentioned in the declaration. And in trespass for assault and battery, or *quare clausum fregit*, where the declaration charges, that the defendant on a certain day and on divers other days between that day and the commencement of the suit assaulted, &c. the plaintiff may prove any number of trespasses within those limits; or he may prove a trespass beyond the remotest day, waiving all the rest (2). And even after proving several assaults within the days mentioned in the declaration, perhaps he would be allowed to give evidence of assaults committed before that time, as proof of the defendant's malice. So in an action for criminal conversation, the plaintiff may prove several acts of adultery within the times specified; and in addition to this, he may shew indecent familiarities antecedent to the first-mentioned day, though he cannot shew a previous criminal connection.

In an action for slander, the plaintiff, after proving the words as laid in the declaration, may shew also, that the defendant spoke other actionable words either before or afterwards (3), or that he published other libels (4). This evidence is admissible for the purpose of proving the defendant's malice in publishing or speaking the words, which are the subject of the action. And the distinction, which was at one time made between words actionable and such as are not actionable, (that, in the latter case they might be given in evidence, but not in the former,) (5) has

(1) See infrà, p. 137, as to the *proof of knowledge* in issuing counterfeit money.

(2) Bull. N. P. 86.

(3) Charlter v. Barrett, Peake, N. P. C 22. Rustell v. Macquister, 1 Campb. 49. Tate v. Humphrey, 2 Campb 73, (b).

(4) R. v. Pearce, Peake. N. P. C. 74. Lee v. Huson, Peake. N. P. C. 166. Plunkett v. Cobbett, MS. case in 2 Sel. N. P. 938.

(5) Mead v. Daubigny, Peake. N. P. C. 125.

been

been since over-ruled (1). In the last case on this subject, Finnerty v. Tipper (2), which was an action for a libel published in a periodical work, Mansfield C. J. refused to admit in evidence subsequent numbers of the same work, unless they expressly referred to the libel, for which the action was brought; for the subsequent publication, he said, might contain the most scandalous imputations, while the former libel may have been almost nothing; and the necessary consequence must be, that the jury would give damages for the second libel in an action for the first, although the defendant would not have the same opportunity of proving the truth of its contents, as if it were made the subject of a distinct action. The Chief Justice was of opinion that the same restriction was proper, and had been observed, in actions for words spoken, namely, that the subsequent words ought to refer to the same subject; and he drew a distinction between the case then before him and that of Carr v. Hood, which had been cited for the admissibility of the evidence; the defence there was, that the publication in question was fair criticism on the writings of the plaintiff, and therefore any other papers published by the defendant, to shew that he was actuated by malice in publishing the libel complained of, were certainly admissible evidence. On a review of the cases, which have been above cited, it will be found that in all of them except two, namely, Lee v. Huson and Rustell v. Macquister, the subsequent words or libels, offered in evidence, did expressly refer to those which were the subject of the action; and in those two cases, it does not appear from the reports, whether they had, or had not, such a reference.

The same rule applies, if possible, more strongly to criminal prosecutions; in which all manner of evidence ought to be rejected, that is foreign to the point in issue. This

In criminal cases.

(1) Rustell v. Macquister, 1 Campb. 49. And see cases cited above.

(2) 2 Campb. 72.

rule is founded in common justice; for no person can be expected to answer, unprepared and at once, for every action of his life. In treason, therefore, no evidence is to be admitted of any overt act, that is not expressly laid in the indictment. This was the rule at common law; and it is again prescribed and enforced by the statute (1) of Wm. 3. which contains an express provision to that effect, in consequence of some encroachments that had been made in several state prosecutions (2). The meaning of the rule is, not that the whole detail of facts should be set forth, but that no overt act amounting *to a distinct independent charge*, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; but still, if it amount to a direct proof of any of the overt acts which are laid, it may be brought as evidence of such overt acts. (3)

On the trial of an indictment for burglary and larceny (4), it appeared upon the evidence, that the prisoners might have entered the house before it was dark, and that they had not taken any part of the goods at the time when they were discovered in the house; upon which, the counsel for the prosecution proposed to give evidence of a larceny in the house committed by the prisoners on a preceding day; but the Court rejected the evidence, on the ground that it tended to prove a felony of a totally distinct kind; the prisoners were, therefore, acquitted on this charge, but afterwards indicted again for the other offence and convicted.

For the same reason, it would not be allowable to shew, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence, as that charged against him. Thus, in a prosecution for an infamous crime, an admission by the prisoner that he had

(1) 7 W. 3. c. 3. s. 8.
(2) Foster, 245, 6.
(3) Id.
(4) R. v. Vandercomb and Abbott, 2 Leach, Cr. C. 816.

com-

committed such an offence at another time and with another person, and that he had a tendency to such practices, ought not to be admitted (1). But on an indictment for uttering a bank note, knowing it to be forged, proof that the prisoner had passed other forged notes of the same kind, is evidence that he knew the note in question to be forged (2); and on a prosecution for uttering counterfeit money, the fact of the prisoner having other counterfeit money upon him, or of his having uttered other pieces of money of the same kind, is evidence of his having known that the money which he uttered was counterfeit (3). Such evidence, far from being foreign to the point in issue, is extremely material; for the head of the offence charged upon the prisoner is, that he did the act with knowledge; and it would seldom be possible to ascertain, under what circumstances the uttering took place, whether from ignorance or with an intention to commit a fraud, without inquiring into the demeanour of the prisoner in the course of other transactions. The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment: and the question then would be, whether the evidence is sufficient to warrant the inference of knowledge at one time, from such particular transactions at another time (4). That is a question entirely for the jury. But whatever weight the evidence may have, (which is quite another consideration,) it is clearly admissible; not as evidence of *another offence*, but simply of *another transaction*, in which the prisoner was engaged (5). The same kind of proof is constantly admitted in trials for murder; in which, former grudges and antecedent menaces are evidence of the prisoner's malice against the deceased.

(1) R. v. Cole, Mich. term, 1810, by all the Judges, MS.

(2) R. v. Wylie, 1 New. Rep. 92. R. v Ball, 1 Campb. 324.

(3) 1 New Rep 92.

(4) Id. 94. See suprà, as to presumptive evidence; and Hunter v. Gibson and Johnson, suprà, p. 133.

(5) See also Rickman's case, 2 East. P. C. 1035.

The

The plea of not guilty puts in issue all the material parts of the indictment; and under this plea the prisoner may give in evidence any matter of justification, excuse, or extenuation. And if some *other acts* of the prisoner, besides those which are the subject of the indictment, are proved against him for the purpose of shewing his design in the affair in question, he will be allowed to explain those parts of his conduct, and with this view may give in evidence other *contemporaneous* particulars of his conduct, which shew that he had a different design from that imputed to him. This limitation (namely, that the particulars offered in evidence by the prisoner ought to be *contemporaneous* with those proved on the other side, or at least confined within the same limits, to which the evidence on the part of the prosecution is subject,) appears to be not unreasonable; for otherwise the prisoner would be at liberty to take the whole range of his life, in the course of which his character and his designs may have undergone a complete change. This observation, however, is made with great deference; as the rule certainly appears to have been carried much further in one of the modern state trials, in the case of Horne Tooke (1). In that case, several publications were given in evidence, on the part of the crown, containing republican opinions, which had been distributed by the prisoner *during the period assigned in the indictment for the existence of the conspiracy*; and this evidence was much relied on, as shewing that the notion of a reform, which was expected to be set up by the prisoner in his defence, was a mere pretext to cover his treasonable designs: to repel this conclusion, the counsel for the prisoner offered in evidence a book, which had been written by the prisoner 12 *years before*, on the subject of parliamentary reform; the evidence was objected to, as having no relation with the particular transaction in question, and because the prisoner's opinions, whatever they were formerly, might have afterwards changed. But Lord Ch. J. Eyre said, that the

(1) 1 East. P. C. 61.

question was not whether this book had a reference to the conspiracy charged, but whether it had not reference to the proof given in support of the charge; and he thought it evidence to rebut the supposition, that the reform of parliament was a pretence made by the prisoner. The book was accordingly received in evidence.

As evidence is to be confined to the points in issue, the character of either party cannot be inquired into, in a civil suit, unless it is put in issue by the nature of the proceeding itself (1). Thus, in an action of ejectment by an heir at law, to set aside a will for fraud and imposition committed by the defendant, witnesses cannot be examined to the defendant's good character (2). So, on the trial of an information against the defendant for keeping false weights, where is was proposed to call witnesses on behalf of his character, Eyre C. B. ruled, that such evidence was not admissible in a civil suit (3). "The offence imputed is not," he said, "in the shape of a crime. To admit such evidence would be contrary to the true line of distinction, which is this, that in a direct prosecution for a crime it is admissible, but where the prosecution is not directly for the crime but for the penalty, it is not. If evidence to character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the excise and custom-house laws." Evidence of character.

But in an action for criminal conversation with the plaintiff's wife, evidence may be given of the wife's general bad character for want of chastity, or of particular acts of adultery committed by her *before* she became acquainted with the defendant (4). This evidence is allowed in mitigation of damages. So it may be proved, in mitigation of damages, that the plaintiff himself has carried on a criminal

(1) Bull. N. P. [298.]
(2) Goodright dem. Farr v. Hicks, Bull. [illegible] P. 296.
(3) Attorney-General v. Bowman, 2 Bos. & Pull. 532, (a).
(4) Bull N. P. 27. 296. Roberts v. Malston, MS. case in Selw. N. P. 23.

con-

conversation with other women (1); or that the plaintiff's wife made the first advances to the defendant (2). Also, in an action for a libel, imputing a crime to the plaintiff, in consequence of which he complained of having lost the society of his acquaintance, the defendant on the general issue has been allowed to shew, in mitigation of damages, that, before and at the time of the publication of the supposed libel, the plaintiff was generally suspected of the crime imputed to him, and that on account of this suspicion his acquaintance had ceased to associate with him (3). Such evidence however is not admissible, where the defendant by his plea puts in issue the truth of the charge imputed (4). And in an action for a malicious prosecution, the defendant after proving circumstances of suspicion against the plaintiff, may give evidence of his general bad character, in order to shew that he had probable cause for instituting the prosecution. (5)

In trials for felony the prisoner is always permitted to call witnesses to his general character; and when the evidence against him is doubtful, such testimony may be sufficient to warrant an acquittal. The same rule seems to apply with equal force to trials for misdemeanors, where the direct object of the prosecution is to punish the offence. So, on the trial of an indictment for a rape, evidence is admissible on the part of the prisoner, that the woman bore a notoriously bad character for want of chastity and common decency, or that she had previously been criminally connected with the prisoner. In such a prosecution, however, it cannot be shewn that she had a criminal connection with *other* persons. (6)

(1) Bull. N. P. 27. Duberley v. Gunning, 4 T. R. 658. Bromley v. Wallace, 4 Esp. N. P. C. 237. Lord Kenyon, in two cases, (Wyndham v. Ld. Wycomb, 4 Esp. N. P. C. 16., and another case there cited,) held such proof to be a *bar* to the plaintiff's action. But now this is not so considered.

(2) Elsam v. Fawcett, 2 Esp. N. P. C. 562. Gardiner v. Jadis, MS. case in Selw. N. P. 25.

(3) Ld. Leicester v. Walter, 2 Cowp. 251; and three other cases there cited by counsel, S. P., and —— v. Moor, 1 Maul. Sel 284.

(4) Snowdon v. Smith, ruled by Heath, J. 1 Maul. Sel. 286, (a).

(5) Rodriguez v. Tadmire, 2 Esp. N P. C. 720.

(6) Hodgson's case, by a majority of the judges on a case reserved. 1812. MS.

As

As the jury are bound to try only the matter in issue between the parties, no evidence need be given to prove any points which are admitted on record, and none can be received to contradict the record (1). Thus in an action for cutting down trees, if the plaintiff replies to the defendant's plea of soil and freehold, that the trees were his trees and freehold, &c., he thereby admits the plea of the defendant, and cannot dispute that he had the freehold of the soil. So if a tenant justifies for common, and the issue on the right of common is found for the demandant, the jury cannot find, that the tenant did not put in his cattle; for that is admitted (2). So in an action of debt on award, where the defendant pleads *no such award*, the jury cannot find matters which make the award void, if they are not contained in the award itself. (3)

The same rule will apply to judgments by default, to the payment of money into court, and to particulars of demand under a Jud order. The effect of these is here shortly considered.

First, as to judgments by default.—A judgment by default is an admission of the cause of action. Thus in an action on a bill of exchange against the defendant as acceptor, it admits that he accepted it, and that the bill is as stated in the declaration; and he cannot afterwards shew on the execution of a writ of inquiry, that he had not accepted it (4); the bill must, indeed, be produced, for the purpose of seeing whether there is any indorsement of money having been paid upon it (5). So in an action for goods sold and delivered, or for money had and received, the defendant by suffering judgment to go by default admits that something is due; and he cannot afterwards dispute the contract of sale, or shew fraud on the part of the plain-

Judgment by default.

(1) Bull. N. P. [298.]
(2) Com. Dig. tit. Pleader, (S. 17.)
(3) 2 Roll. Ab. 692. l. 25.
(4) Green v. Hearne, 3 T. R. 301. Bevis v Lindfell, 2 Str. 1149.
(5) 3 T. R. 302. Billers v. Bowles, Barnes Rep. , Ellis v. Wall, ib.

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tiff in making the contract (1); but the plaintiff will only have to prove the amount due to him. So on the execution of a writ of inquiry after judgment on demurrer, the defendant cannot controvert any thing but the amount of the sum in demand; as, in an action for goods sold and delivered, to which the defendant pleaded coverture, and the plaintiff replied, that the defendant's husband had resided abroad and that the defendant during all the time, &c. had carried on trade as a feme sole, the Court were of opinion, that, after judgment on demurrer to this replication, evidence of the wife having acted as agent to the husband ought not to have been admitted on the execution of the writ of inquiry; that the only question to be decided by the jury was on the amount of the debt, and that the question whether the debt had been contracted by the defendant as agent for her husband, or in her separate capacity, ought to have been considered as determined by the record. (2)

Payment of money into court.

Secondly, as to payment of money into court. — Such payment is in general an acknowledgment of the right of action to the amount of the particular sum (3). And as it is an acknowledgment on record, the party cannot recover it back, although he has paid it wrongfully or by mistake (4). It is an admission by the defendant that the plaintiff has a legal demand to a certain extent; but it is not an acknowledgment beyond that amount, and will not preclude the defendant from taking any objection to the action with respect to any other part of the demand, to which the payment of the money does not apply, although, if no money had been brought into court, the objection might have been a bar to the whole demand (5). Where there is a count on a special contract together with money counts, payment of money generally upon the whole declaration is

(1) East Ind. Comp. v. Glover, 1 Str. 612.

(2) De Gaillon v. L'Aigle, 1 Bos. Pull. 368.

(3) 5 Burr. 2640. 1 T. R. 465. 2 East, 134.

(4) Vaughan v. Barnes, 2 Bos. Pull. 392. 2 T. R. 645.

(5) Cox v. Parry, 1 T. R. 464.

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an admission of the contract on every count, to which the contract is in its nature applicable (1); and after such an admission the defendant will be precluded from disputing the existence of the contract as stated. Thus in an action on a bill of exchange, the defendant, by paying money into court generally, dispenses with the regular proof of the party's handwriting (2), and cannot object to the sufficiency of the stamp on which the bill is drawn (3). So, in an action of covenant, he admits the execution of the deed (4). So where the plaintiff brought an action for work and labour as a surgeon, the defendant by paying money into court admitted his right to recover in that character, and was not allowed to dispute it at the trial (5). And payment of money into court has been held to be a conclusive admission of the plaintiff's right to sue in that court (6). So where the defendant paid money into court generally upon a declaration containing a count on a policy of insurance together with money counts, he was not afterwards permitted to shew, that the policy was originally different, and had been altered by the broker without his knowledge (7). But if the plaintiff previous to the trial has induced the defendant to believe, that the only point to be tried would be a question of fraud, and has suffered him to prepare his evidence for that purpose, the Court will not allow the plaintiff to object to the receipt of that evidence at the trial, on the ground of the contract having been admitted by the payment of money into court. This was determined by the Court of Common Pleas in the case of Muller v. Hartshorne (8). Lord Alvanley C. J. on the trial of that case, allowed the defendant to prove fraud on the part of the plaintiff, in order to avoid the instrument (9). But the Court afterwards declined giving any opinion on that point,

(1) Bennett v. Francis, 2 Bos. Pull. 550.
(2) Gutteridge v. Smith, 2 H. Bl. 374
(3) Israel v. Benjamin, 2 Campb. 40.
(4) Randal v. Lynch, 2 Campb. 357. Watkins v. Towers, 2 T. R. 275.
(5) Lipscombe v. Holmes, 2 Campb. 441.
(6) Miller v. Williams, 5 Esp. N. P. C. 19.
(7) Andrews v. Palsgrave, 9 East, 325.
(8) 3 Bos. Pull. 556.
(9) Ib. and see 2 Bos. Pull. 392.

because

because under the circumstances of the case the plaintiff was not at liberty to avail himself of that objection.

Payment of money into court is an admission only of a *legal* demand. If the contract declared upon be illegal, the defendant cannot give it validity by his admission; no admission of the parties will oblige the court to give effect to an illegal transaction (1). And although paying money into court admits the contract, that is, the entire consideration for the act and the entire act which is to be done for such consideration, yet it will not be an admission of other parts of the contract, which are distinct and collateral, respecting the liquidation of damages after breach of the contract. In the case of Clarke v. Gray (2) the Court of King's Bench after much consideration determined, that, in an action of assumpsit against a carrier for the loss of goods, the plaintiff might maintain his action, although it was proved on the part of the defendant, that he was not to be accountable *for more than 5l.* for goods, unless entered as such and paid for accordingly, and the goods in question though above the value of 5*l.* had not been paid for. The Court were of opinion, that the plaintiff was entitled to retain a verdict, which he had recovered for 5l., the limited amount of the damages recoverable under this contract; that this restriction was a part of the contract, *collateral* to the entire consideration and to the act to be done for that consideration, and as it related merely to the liquidation of damages after a breach of the contract, that it might be properly given in evidence to the jury in reduction of damages. It follows from this case, that if the defendant had paid money into court, he would have been allowed to give in evidence the restrictive provision, and that such evidence would not have been inconsistent with the admission of the contract stated in the declaration; though the contrary was decided in the earlier case

(1) Ribbans v. Cricket, 1 Bos. Pull. 264. 2 East, 134.

(2) 6 East, 564.

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of Yate v. Willan (1), on the ground, that the notice containing the restriction was *a limitation of the contract*, and that if no money had been brought into court the plaintiff must have been nonsuited. But the Court of King's Bench, adverting to this case in the before-cited case of Clarke v. Gray, said, "It appears to us, that the case of Yate v. Willan cannot be supported to its full extent; for although the payment of money in that case did admit the contract as stated in the declaration, it did not admit a contract incompatible with the restrictive provision as to the amount of damages to be recovered in case of loss." If indeed the provision is of such a nature as will discharge the defendant from *all liability under the contract*, unless the plaintiff has complied with the condition, (as was the case in Clay v. Willan (2), where the goods were not to be accounted for *to any amount*, unless properly entered and paid for,) that will not merely operate in reduction of the damages, but in bar of the action; and therefore in such a case, if the defendant pays money into court on a declaration against a carrier in the common form, he cannot afterwards give in evidence such a provision, which entirely negatives the contract as stated in the declaration.

Payment of money into court ought to be proved by the production of the rule of court, or by the office copy of the rule. It will not be sufficient to call the attorney, who has taken the money out of court. (3)

Thirdly, as to bills of particulars. — It has been before mentioned that a bill delivered by an attorney to his client for business done during a certain period, or to a tradesman for goods sold, is strong presumptive evidence against any additional item within the same period. The party is not however precluded from shewing that items, included in a subsequent bill, have been omitted by mistake in the former bill,

Bill of particulars.

(1) 2 East, 128.
(2) 1 H. Bl. 298. 6 East, 570. As to the commencement of the practice of paying money into court, see 2 H. Bl. 376; 1 Ld. Raym. 254.
(3) Israel v. Benjamin, 3 Campb. 40.

bill, and that the business which is the subject of the charge has been done by him for the defendant. A bill of particulars, delivered under a Judge's order, is more conclusive: its sole object is to inform the opposite party of what he ought to come prepared to try; and it will effectually preclude the party, who delivers it, from giving evidence of any other demand not there stated. Thus, where a declaration contained a count for money had and received for the plaintiff's use, and also a demand for horses sold by the plaintiff to the defendant himself, and the bill of particulars specified the last demand alone (1), it was decided that the plaintiff could not give evidence of horses being sold by the defendant as the plaintiff's agent; for, a contract for the absolute sale of horses to the defendant is essentially different from a contract to repay money received on a sale of horses by commission; and the proceeds of such a sale by the defendant could only be recovered under the count for money had and received, which the plaintiff abandoned by confining his bill of particulars to the demand stated in the other count. So, where the declaration contains a count on a promissory note together with money counts, and the particular of demand includes only the note, the plaintiff will not be allowed to prove the consideration for which the note was given, and if he cannot recover upon the note on account of the want of a proper stamp, he will be nonsuited (2). And although the plaintiff, on perceiving the defect of his first particular of demand, which only mentions the promissory note, delivers a second bill of particulars large enough to comprehend the original debt, yet this will not avail him, unless the second particular has been delivered under a judge's order (3). On the other hand, if the plaintiff, either before or after delivering a bill of particulars under a judge's order, makes a demand of payment only for a part of the articles specified in the bill, such a demand

(1) Holland v. Hopkins, 2 Bos. Pull. 243.

(2) Wade v. Beasley, 4 Esp. N. P. C. 7.

(3) Brown v. Watts, 1 Taunt. 353.

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will not have the effect of confining him in his evidence, nor supersede the bill of particulars (1). If the plaintiff in the former case could have recovered on the promissory note, he might have recovered interest also, as arising out of the principal and incident to it, though interest has not been specifically claimed in the particular of demand which gives notice of the amount of the note. (2)

In an action of assumpsit, where the defendant pleaded in abatement, that the premises were made by himself and another person jointly, on which plea issue was joined, and on the trial it appeared from the bill of particulars that some of the articles had been furnished to the defendant jointly with the person named in the plea, Lord Kenyon C. J. held that the plaintiff was bound by his bill of particulars, which supported the defendant's plea; and therefore he nonsuited the plaintiff (3). Here the articles stated to have been furnished on the joint credit of the defendant and another person, were items of the plaintiff's demand; and a *necessary* part of his bill of particulars, if he intended to recover payment upon them against the defendant. And this seems to distinguish the case from that of Miller v. Johnson (4), which was an action for the sale of some lottery tickets, and as proof of the sale the particular of the defendant's set-off was produced, which mentioned the fact of the sale of the tickets to himself: but Ch. J. Eyre, who tried the cause, was of opinion that the particular could not properly be used against the defendant for this purpose, and that the fact of sale ought to be proved by other evidence.

The use of a bill of particulars is to prevent the inconveniencies which might otherwise arise from the general and

(1) Short v. Edwards, 1 Esp. N. P. C. 373.

(2) Blake v. Lawrence, 4 Esp. N. P. C. 147.

(3) Colson v. Selby, 1 Esp. N. P. C. 451. A rule to set aside the nonsuit was afterwards refused by the Court.

(4) 2 Esp. N. P. C. 602.

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undefined statements in the plaintiff's declaration, and to apprise the defendant of the particulars of the demand, which the plaintiff has against him. If it gives sufficient information to the opposite party to guard him against surprise, it answers the purpose for which it was intended, and will be sufficient, though it may be in some respects inaccurate. Thus in an action of assumpsit for money paid to the defendant's use, where in the bill of particulars an item for money advanced was by mistake written under the name of A. B. instead of being written under that of C. D. in another part of the particular, and thus appeared to have been advanced to the former, Lord Ellenborough allowed the plaintiff to prove that the item in question was intended and must have been understood to refer to the latter name, but by mere clerical error had been misplaced; and that if the defendant could shew by affidavit that he had been misled by the plaintiff's particular, it might furnish a ground for the Court afterwards to set aside that particular sum (1). So where the work, for which the action was brought, was stated by the particular to have been done in a wrong month, when in fact no work had been done, the plaintiff was allowed to give evidence of his having done work for the defendant in the other month (2). And although the general rule is, that the party shall be confined to his own bill of particulars, and not admitted to give evidence of any additional demand, yet under certain circumstances, in a case where the proofs produced by the defendant himself established another claim in his favour, the plaintiff has been allowed to have the benefit of such evidence even beyond the contents of the particular. Thus, where an action was brought by one partner against another to recover a balance due on a statement of accounts, the plaintiff by his bill of particulars confined himself to the balance due on *separate accounts*, in support of which he gave in evidence an account by the defendant making himself debtor to a

(1) Day v. Bower, 1 Camph. 69. n.

(2) Millwood v. Walter, 2 Taunt. 224.

certain

certain amount; and in answer to this evidence the defendant produced an account subsequently rendered by the plaintiff, according to which there appeared to be a balance due on the *separate* accounts to the defendant; but on the opposite side of the page, there was a statement also of the *partnership* accounts, on which the balance was in favour of the plaintiff and greatly exceeded the balance on the *separate* account. It was objected that the plaintiff could not recover beyond his particular; the Court however said, that the defendant himself had given the plaintiff a better case than he was at liberty to make for himself, and that the plaintiff was entitled to a verdict for all that had been proved to be due to him (1). The parties afterwards came to a compromise, and agreed upon the sum to be recovered. It is to be observed, that there were peculiar circumstances in this case; the written paper, which the defendant gave in evidence as the writing of the plaintiff, could only have been admitted as one entire writing, the whole to be taken together, and was not admissible merely in parts; the defendant could not use in evidence the *separate* account of the plaintiff without admitting also the *partnership* account, which was written by him on the same paper, since the one part might have explained or referred to the other, and if the statement of a party is given in evidence against himself, the *whole* of the statement ought to be received, though all its parts may not deserve the same credit. But it appears to be too much to infer generally from the authority of this case, that, because the evidence adduced by the defendant shews, there were other items which might have been included in the bill of particulars, the plaintiffs ought therefore to recover on these items, as well as upon those which are specifically mentioned. The case in question must be considered as a particular exception, and not as establishing a rule of so wide and general a nature. The plaintiff, it is presumed, can neither cross examine the defendant's

(1) Hurst v. Watkis, 1 Campb. 68.

witnesses to any claim, which he has not comprehended in his particular of demand, nor can he at the trial avail himself of any such claim, though disclosed by the witnesses on the other side in their examination in chief.

Sect. IV.

The Affirmative of the Issue is to be proved.

The next rule is, that the point in issue is to be proved by the party who asserts the affirmative; according to the maxim of the civil law, "ei incumbit probatio, qui dicit, non qui negat." Thus, in an action for a loss by barratry in the master of a ship, where it was objected by the defendant, that the plaintiff ought to prove that the master was not also the owner or freighter, and that he did not act under the direction of the person who was, in which case barratry could not be committed, the Court held, that, if the master was owner or freighter, or acted under the direction of the owner, the burthen of proving that fact lay on the defendant (1). In an action on the game laws, though the plaintiff must aver, in order to bring the defendant within the act, that he was not duly qualified; yet it is not necessary to disprove his qualifications; but it will be for the defendant, if he can, to prove himself qualified (2). And there appears to be no good reason, why the same rule of evidence should not be adopted in proceedings on convictions before magistrates, as well as in an action for penalties. A distinction has, however, been made; and some of the Judges have been of opinion, that, on such proceedings, some evidence of the want of qualification ought to be produced (3). But it is admitted, that

(1) Ross v. Hunter, 4 T. R. 33, 38.

(2) By Lord Mansfield, in Spieres v. Parker, 1 T. R. 144; Buller, J. in 1 T. R. 649; Heath, J. in Jelfs v. Ballard, 1 Bos. Pul. 468; Chambre, J. in Frontine v. Frost, 2 Bos. Pul. 307; adm. per Cur. in R. v. Stone, 1 East, 650.

(3) R. v. Jarvis, 1 Burr. 148, 153; 1 East, 643, (c) S. C. By Lord Kenyon and Grose, J. in R. v. Stone, 1 East, 649; and Chambre, J. in 3 Bos. Pul. 307. And see R. v. Marriott, 1 Str. 66; Bluet q. t. v. Needs, Com. Rep. 522, 5.—Contrà Lawrence, J. and Le Blanc, J. 1 East, 653.

only

only *general* evidence of this negative fact can be necessary. (1)

Where one party charges another with a culpable omission or breach of duty, the general rule above laid down does not apply. In such a case, the person who makes the charge is bound to prove it, though it may involve a negative; for it is one of the first principles of justice, not to presume that a person has acted illegally, till the contrary is proved. Thus, in a suit for tithes in the Spiritual Court, where the defendant pleaded, that the plaintiff had not read the thirty-nine articles, the Court put the defendant to prove the fact, though a negative; upon which, he moved the Court of King's Bench for a prohibition; but it was refused, for the reason already stated (2). So, in an action by the owner of a ship against the defendants, for putting on board a quantity of combustible and dangerous articles "without giving due notice thereof," the Court held, that it lay upon the plaintiff to prove this negative averment (3). So on an indictment on the statute 42 G. 3. c. 107. s. 1., which makes it felony to course deer on an inclosed ground *without the consent of the owner*, the negative ought to be proved, that the owner had not given his consent. (4)

It is a general rule of evidence, that the burthen of proof lies on the person, who has to support his case by proof of a fact, of which he is supposed to be cognizant. Thus, in an action by the assignees of a bankrupt, where the defendant, under a notice of set-off, gave in evidence promissory notes dated before the bankruptcy, the Court held that he ought also to shew, that the notes came to his hands before that time (5). So where the question is on

(1) R. v. Crowther, 1 T. R. 125.

(2) Monke v. Butler, 1 Roll. Rep. 83. cited by Lord Ellenborough, 3 East, 199; Powell v. Milbank, 2 Black. Rep., 851, S. P. See also Lord Halifax's case, Bull. N. P. [298]. R. v. Combs, Comb. 57.

(3) Williams v. E. Ind. Comp. 3 East, 193; 9.

(4) R. v. Rogers, 2 Camp. 654.

(5) Dickson v. Evans, 6 T. R. 57.

the legitimacy of a child, if a legal marriage is proved, the legitimacy is presumed, and the party who asserts the illegitimacy ought to prove it (1): But if there has been a divorce *à mensâ et thoro*, the presumption is, that a child born afterwards, (as a year after the sentence, &c.) is illegitimate (2); it will be sufficient therefore in such a case to prove the divorce; and this will call upon the opposite party to establish the legitimacy by proof of access. So where the issue is upon the life or death of a person, the proof of the fact lies upon the party who asserts the death, for the presumption is that the party continues alive, until the contrary be proved (3). But where no account can be given of the person, this presumption of the duration of life ceases at the expiration of seven years from the time when he was last known to be living (4); a period, which has been fixed, from analogy to the statute of bigamy (5), and the statute concerning leases determinable on lives (6)*. Thus in the case of Doe v. Jesson, where it was proved that a person went to sea at a particular time, which was the last account given of him, his death was presumed at the end of seven years from that time. And therefore, where the defendant pleaded coverture in bar of an action of assumpsit, and proved her marriage, and that her husband went abroad twelve years before the commencement

(1) See ante, p. 112.
(2) Parishes of St. George and St. Margaret, 1 Salk. 123. See ante, p. 113.
(3) Wilson v. Hodges, 2 East, 312.
(4) Doe dem. George v. Jesson, 6 East, 80, 85.
(5) St. 1 J. 1. c. 11, s. 2.
(6) St. 19 C. 2. c. 6.

* The statute of bigamy contains a proviso, that "it shall not extend to any person, whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other by the space of seven years together within the king's dominions, the one of them not knowing the other to be living within that time." It has been held, that the last clause, (namely, "the one of them not knowing," &c.) relates only to the 2d clause, and not to the *first* respecting commorancy beyond the seas; and consequently that the second marriage is not felonious, where either of the parties is beyond the seas for seven years, though the party in this country had notice that the other was living. 3 Inst. 88. 1 Hale P. C. 692. 4 Bl. Com. 164.

of

of the action, this was held not to be sufficient, and the defendant was required to prove that her husband was alive within seven years (1): without such additional proof, the jury might have presumed the *death* of the husband at the time of the promise, which would have been against the defendant's plea.

Although, in general, it is necessary for a party, who brings an action, to prove all the material facts which he alleges in support of his claim, yet where the defendant pleads a fact within his own knowledge in discharge of himself, and the plaintiff still insists on the defendant's liability, alleging the same fact in his replication, there the burthen of the proof lies on the defendant, not upon the plaintiff. Thus in an action of assumpsit, where the defendant pleaded infancy, and the plaintiff replied, that "the defendant, after he had attained his full age, ratified and confirmed the promise and undertaking," the Court held, that the mere proof of a promise to pay was sufficient on the part of the plaintiff; and that it was for the defendant to prove the personal incapacity to contract, on which he grounded his defence, and which lay so peculiarly within his own knowledge. (2).

Sect. V.

The Substance only of the Issue need be proved.

The next rule to be considered is, that, on any issue, it will be sufficient to prove the substance of the issue. Thus where the defendant pleaded payment of the principal sum and of all interest due, and it appeared in evidence that a gross sum was paid, not amounting to the full interest, but accepted by the plaintiff as full payment, the Lord Ch. Justice Raymond held the proof to be sufficient (3). So, in

(1) Hopewell v. De Pinna, 2 Campb. 113.

(2) Borthwick v. Carruthers, 1 T. R. 648.

(3) Price v. Brown, 2 Str. 690.

in an action upon a special promise to deliver up a bond on the payment of a sum of money, which had been borrowed of the defendant; the evidence for the plaintiff was, that the money had been tendered to the defendant, and the bond had been demanded, but refused; and, an objection being made on the part of the defendant, that the plaintiff's case had not been proved as laid, Lee Ch. J. over-ruled it; and the Court of Common Pleas, after taking time to consider, were unanimously of opinion, that the evidence was sufficient to support the declaration; as the tender on the one side, and the refusal to accept on the other, were in point of law equivalent to payment. (1)

In an action of waste for cutting down a certain number of trees, proof that the defendant cut a smaller number is sufficient; for, in effect, the issue is waste or no waste (2). So, in an action against a sheriff, where the plaintiff declared, that he had J. S. and his wife in execution, and that the defendant suffered them to escape, and a special verdict was found, that the husband alone was taken in execution, (the execution being for a debt due from the wife before coverture,) and that he escaped, the Court held that the substance of the issue was found, and gave judgment for the plaintiff (3). In an action on a simple contract, whether assumpsit or debt, the plaintiff may prove and recover a less sum than he has demanded in the writ; and for this reason, it has been held, that a declaration in such action is not bad for specifying a less sum, though the breach assigned is the nonpayment of the whole sum demanded. (4)

In actions for slander, the courts used at one time to hold, that the plaintiff was bound to prove the words precisely as laid; but it is now settled, that it will be sufficient,

(1) Alcorn v. Westbrook, 1 Wils. 115; Wright J., at first, *contrà*.

(2) Co. Lit. 282. a. 2 Roll. Ab. 706. tit. Verdict, C, Art. 40.

(3) Roberts and Wife v. Herbert, 1 Sid. 5. S. C. cited Bull. N. P. 299.

(4) M'Quillin v. Cox, 1 H. Bl. 249.

if the plaintiff prove the substance of the words. And if the declaration contain several actionable words, the plaintiff will be entitled to a verdict on proving some of them (1). In the late case of Hall v. Smith (2), where the declaration stated, that the plaintiff was a trader at C and also a trader at O, and that the defendant spoke concerning the plaintiff *as such trader, that he was a bankrupt at C,* &c., it was proved at the trial, that the plaintiff carried on a trade at O, but not that he carried on the other trade at C as stated, and the words spoken of him were *that he was a bankrupt at C in the liquor trade,* (which was the trade carried on at O), the Court held, that the substance of the charge had been proved, and that the place, where the plaintiff was stated to have become a bankrupt, was immaterial.

In an action of replevin, where the defendant avowed taking the cattle as damage-feasant, the plaintiff pleaded in bar, that one W was seized of a house and land, &c., whereto he had common &c. and demised the same to him to hold *from* a certain day next before for a year, the avowant traversed the lease *modo et formâ,* upon which issue was taken; the jury found a special verdict, that W made a lease to the plaintiff *on* the day stated for a year; and the plaintiff had judgment, for although this is not the same lease as pleaded, (since this begins on the day and the other not so soon,) yet, the Court said, the substance of the issue is, whether or not the plaintiff had such a lease, as by force thereof he might have common at the time, and this appeared to be the case here. (3). But, the Court added, it (the verdict) must not depart altogether from the form of the issue; for if it had been found that he had right of common by a lease from another, or as an owner, that had been clearly out of the issue both in matter and form. And they admitted, that if the plaintiff had declared

(1) Compagnon v. Martin, 2 Bl. Rep. 790.

(2) 1 Mau. & S. 287.

(3) Pope v. Skinner, Hob. 72. S. C. cited, Bull. N. P. 300.

thus

thus in *ejectione firmæ*, it would have been clearly against him, for there he *demands* and recovers the *term*, and therefore must make his title truly. In the principal case, as the reporter observes, the jury might have found directly against the plaintiff *non dimisit modo et formâ*, and could not safely have found a general verdict for him; but, the jury having found specially, the Court gave judgment for the plaintiff. (1)

In replevin, if the defendant avow taking the cattle as damage-feasant, and the plaintiff justify for common, and aver that the cattle were levant and couchant, on which issue is joined, proof only for *part of the cattle* is not sufficient, for the issue is upon the whole (2). So, if the issue joined between the parties were, whether A and B were churchwardens, proof, that one was and not the other, would not be sufficient (3). So, where the delaration averred, that the plaintiff was constable of a *particular parish*, and that he was assaulted in the execution of his office as constable, and it appeared on the evidence, that he had been sworn in to serve for a whole liberty, of which the parish formed a part, this was held to be a material variance. (4)

On a charge of petit treason, if the killing with malice is proved, but no circumstances of aggravation are proved to make the offence treasonable, the prisoner may be found guilty of the murder. So on an indictment for burglary and stealing goods, if it appear that no burglary was committed, as where the breaking and entering were not in the night, the prisoner may be found guilty only of the simple larceny (5); so, on a charge of robbery, where the

(1) S. C. cited as to this point, Com. Dig. tit. Pleader, S. 7.

(2) Sloper v. Allen, 2 Roll. Ab. 706. tit. Trial, C. 41. S. C. cited Bull. N. P. 299. See also Consy v. Vcrden, cited from MS. in 1 Selw. N. P. 393; Griffin v. Blandford, Cowp. 62; Brook v. Willett, 2 H. Bl. 224; 1 Campb. 314, 5; as to variances in the proof of a prescription or custom.

(3) Bull. N. P. 299.

(4) Goodes v. Wheatly, 1 Campb. N. P. C. 231.

(5) 2 East, P. C. 513.

pro-

property was not taken from the person by violence or by putting him in fear. So, on the trial of an indictment for murder, the jury may find the prisoner guilty of manslaughter only; for the principal matter is the killing, and the malice is only a circumstance in aggravation (1). And if the manner or means of the death proved agree in substance with the means charged in the indictment, it will be sufficient; as, where the indictment is for killing with a dagger, and the evidence prove a killing with a staff (2); so, if the indictment be for killing with one sort of poison, and the evidence proves the killing with another, such evidence maintains the indictment, because the proof of the instrument is not absolutely necessary to the proof of the fact itself (2); but if the charge is for poisoning, and the death is proved to have been caused by striking or starving, &c., this evidence would not support the indictment as the species of death in the one case is totally different from that in the other. (3)

So, if the indictment charges that A gave the mortal blow, and that B and C were present abetting, &c., but on the evidence it appears that B struck, and that A and C were present &c., this is not a material variance, for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others, as if they all three had held the weapon, and had altogether struck the deceased (4). But if two persons are indicted as principals, and one is proved to be only accessary, he must be discharged on this indictment (5). So one indicted as accessary before cannot be convicted upon evidence proving him to have been (principal in the second degree) present aiding and abetting at the fact (6). In Mackalley's case (7), where the prisoner was tried for the murder of a

(1) Mackalley's case, 9 Rep. 67. b. Co. Lit. 282. a. Gilb. Ev. 233.
(2) 9 Rep. 67. a. Gilb. Ev. 231. 1 East, P. C. 341.
(3) Ib. and 2 Inst. 319.
(4) Mackalley's case, 9 Rep. 67. b. 4 Rep. 42. b. Wallis's case, 1 Salk. 334.
(5) Gilb. Ev. 232.
(6) Gordon's case, 1 East, P. C. 352.
(7) 9 Rep. 61. b. 67. a. 68. a.

serjeant

serjeant at mace in London, the indictment charged, that the sheriff made a precept to the serjeant for the arrest, and it appeared upon the evidence, that there was no such precept, but that the serjeant made the arrest ex officio at the plaintiff's request on the entry of the plaint, according to the custom of the city; and all the judges held, that the variance between the indictment and the evidence was not material, because the warrant to arrest was only a circumstance, and the substance of the matter had been found, which was, that the prisoner killed an officer in the lawful execution of legal process. The Judges were also of opinion, that the indictment might have been general, (that the prisoner feloniously and of his malice prepense killed, &c.) and that the special matter might have been given in evidence; and since the indictment in the principal case contained such an averment, they held that the charge of murder had been proved, notwithstanding that the special matter given in evidence might vary in substance from the special matter contained in the indictment.

Averments when immaterial.

A great variety of cases occur in the books with respect to the necessity of proving averments in pleadings. Immaterial averments need not be proved; but because an averment might have been unnecessary, it will not therefore follow that it is immaterial (1). The general rule on this subject is, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it will not be necessary to prove it; but it is otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover (2). Thus in the case of Bristow v. Wright (3), which was an action against the sheriff for taking the lodger's goods without

(1) 1 Maul & Sel. 204. Crawley v. Blewett, 12 Mod. 127. Savage q. t. v. Smith, 2 Blac Rep. 1191. Turner v. Eyles, 3 Bos. & Pul. 456.

(2) By Lawrence, J. in Williamson v. Allison, 2 East, 452.

(3) 2 Doug. 664. See 5 T. R. 496; 2 East, 450, 2; 8 East, 9

leave

leaving a year's rent, the declaration stated some particulars of the demise relative to the time of payment of rent, which were negatived by the evidence, and the Court held that the variance was fatal. There, it was necessary for the plaintiff, in order to shew that he was landlord, to set forth a contract between himself and the tenant, and no part of the contract alleged could be struck out, because it was in its nature entire, though it was admitted that the part of the contract relating to the time of payment need not have been averred. And the case of Williamson v. Allison (1) illustrates the other part of the rule, namely, that where an averment may be struck out, it need not be proved. That was an action on the case in tort for the breach of a warranty in selling goods unfit for sale, and the declaration averred, that the defendant knew the goods to be in an unfit state, of which fact there was no evidence at the trial, but the Court held that such proof was unnecessary, for if the whole averment respecting the defendant's knowledge of the unfitness for sale were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved.

The same rule is applicable to averments in an indictment. If an averment may be entirely omitted, without affecting the charge against the prisoner and without detriment to the indictment, it will be considered as surplusage, and may be disregarded in evidence. Thus, where the prisoner was charged with a robbery *near the highway*, and the robbery was proved, but not near the highway (2), so, where the robbery was averred to have been committed in the *house of a certain person* named, and the name of the owner was not proved (3), so, where the offence of arson was stated in the indictment to have been committed in the *night-time*, and was proved not to have been in the night-time (4); in these cases, all the judges were of opinion, that

(1) 2 East, 446. See also Peppin v. Solomon, 5 T. R. 496.

(2) Wardle's case, 2 East, P. C. 785.

(3) Pye's case, Johnstone's case, ib.

(4) Minton's case, 2 East, P. C. 1021.

the

the convictions were proper, and the prisoners were ousted of the benefit of clergy. But where the averment in the indictment is sensible and material, it ought to be regularly proved; as, where the prisoner was indicted for a burglary in the house of J. D. *with intent to steal the goods of J. W.*, and it appeared in evidence that no such person had any goods in the house, but that the name J. W. was put by mistake for J. D. (1), the judges held, that it was material to state truly the property of the goods, and on account of this variance the prisoner was acquitted.

Variance in proof of *contract.*

Where the action is brought upon a *contract*, the contract ought to be stated correctly, and proved as laid; and if any part of the contract proved vary materially from that stated in the pleadings, the whole foundation of the action fails, since the contract is entire and indivisible (2). If the contract, therefore, for the breach of which the action is brought, was in the alternative at the option of the defendant, (as to deliver *such or such* a quantity of goods at one time, and the remainder at another,) it ought to be so stated, for if the declaration states an absolute contract, and the proof is of a contract in the alternative, the plaintiff cannot recover, although the defendant may have determined his option (3). It will not be necessary for the plaintiff to state all the several parts of a contract, which consists of distinct and collateral provisions; but it is sufficient to state so much of the contract, as contains the entire consideration for the act and the entire act to be done in virtue of such consideration, including the time,

(1) Jenks's case, 2 East, P.C. 514.

(2) 1 T.R. 240; 3 T.R. 645. See Bristow v. Wright, 2 Doug. 664, (suprà, p. 158., S.C.;) Carlisle v. Trears, Cowp. 671; Durston v. Tuthan, cited 3 T.R. 67; Littler v. Holland, 3 T.R. 590; Hockin v. Cooke, 4 T.R. 314; Leery v. Goodson, 4 T.R. 687; White v. Wilson, 2 Bos. & Pul. 116; Penny v. Porter, 2 East, 2; Weall v. King, 12 East, 452; Brown v. Sayce, 4 Taunt. 320; Pool v. Court, 4 Taunt. 700; Cohen v. Hannam, 5 Taunt. 101. See also Whitwell v. Bennet, 3 Bos & Pul. 559, Gordon v. Austin, 4 T.R. 611, Roche v. Campbell, 3 Campb.N. P. C. 247, Hodge v. Fillis, 3 Campb. 463, which are cases on promissory notes or bills of exchange.

(3) Penny v. Porter, 2 East, 2; and see 2 East, 134; Cooke v. Munstone, 1 Bos. & Pul. N. R. 351.

manner,

manner, and other circumstances of its performance (1). Thus if there is a provision in the contract to discharge the party from all liability, in case a particular condition is not complied with, it ought to be set out and strictly proved; but it is otherwise, where the provision respects only the liquidation of damages on a breach of the contract; such a provision need not be stated in the pleadings (1). So, in an action on the case upon the warranty of a horse, if the plaintiff states truly the whole of the consideration for the promise of the defendant, (which, in the case referred to, was the redelivery of the horse to the defendant,) and then states truly the substantive parts of the warranty, of the breach of which he complains, this will be sufficient, without averring other parts of the warranty which are entirely collateral and irrelevant to those stated (2). In the late case of Gladstone v. Neale (3), the contract stated was for the purchase of a certain quantity of goods, ("to wit, eight tons,") and the contract proved was for the purchase of "*about* 8 tons," the exact amount not being known at the time of making the contract, but being ascertained before the action was brought; and it was determined at the trial, and afterwards by the Court of King's Bench, that the variance was not material.

In all cases of joint contracts, in writing or by parol, or *ex quasi contractu*, and in all cases of joint obligations, it seems now to be settled, that, if one only be sued, he must plead the matter in abatement, and cannot take advantage of it afterwards upon any other plea or in arrest of judgment, or give it in evidence. Thus in an action against the defendant as drawer of a bill of exchange, who pleaded non assumpsit, and it appeared in evidence at the trial, that the bill was drawn by the defendant and another jointly; on a motion to set aside the verdict, (which had been found for the plaintiff,) upon the ground of this supposed va-

(1) Clarke v. Gray, 6 East, 564, 9; and see suprà, p. 144, S. C.

(2) Miles v. Sheward, 8 East, 7.

(3) 13 East, 410

riance, the Court of Exchequer were clearly of opinion, that there was no variance between the bill of exchange proved and that which was declared upon (1). The same rule holds, when the action is brought against one of several partners; the defendant must plead in abatement, and cannot give the partnership in evidence under the general issue (2). Formerly, a different rule was adopted, on the ground of a supposed variance (3). But with respect to the *party suing*, the rule is still the same; namely, that if an action of assumpsit is brought by one only of several persons, who ought to join, the defendant may take advantage of it upon non assumpsit. (4)

Variance in proof of *deed*.

Where a *deed* is declared upon, and it appears on comparing and reading the record with the instrument produced, that some of the words stated in the pleadings as descriptive of the deed, (and which cannot be rejected as surplusage,) vary from the deed, the variance will be fatal (5); and though some parts of the deed, which the declaration purports to set out at length, need not have been stated at all, or might have been stated shortly according to their legal effect and operation (6), yet if they are set out at length, they ought to be proved as laid, and in case of a variance the plaintiff must fail.

Variance in proof of *record*.

A similar rule has been laid down, where a *record* is referred to in the pleadings. If the allegation is descriptive of the record, it ought to be strictly and literally proved as laid. Thus, in the case of Green v. Rennett (7), where a writ was described in terms, when sued out and when re-

(1) Evans v. Lewis, 1794, MS. case, reported in Mr. Serjt. Williams's edit. of Saund. 1 V. 291. d. See also Germain v. Frederick, MS. case, id. and Cowp. 832.

(2) Rice v. Shute, 5 Burr. 2611. Abbott v. Smith, 2 Black. 947.

(3) Boson v. Sandford, 2 Salk. 440.

(4) 2 Str. 820. Graham v. Robertson, 2 T. R. 282; and see 1 Saund. 291. f. note.

(5) Pitt v. Green, 9 East, 188; Bowditch v. Mawley, 1 Campb. 195.

(6) Dundass v. Lord Weymouth, Cowp. 665; Price v. Fletcher, Cowp. 727; Roulston v. Clarke, 2 H. Bl. 563.

(7) 1 T. R. 656; 9 East, 161, 163. Brown v. Jacobs, 2 Esp. N. P. C. 726. R. v. Taylor, 1 Campb. N. P. C. 404. See also Com. Dig. tit. Record, (C), (D).

turnable,

turnable, and on the production of the writ itself it appeared to be returnable on a different day from that stated in the declaration, the Court held that the variance was fatal, though the day of the return was laid under a * videlicet. The return-day was material in that case, because it was part of the description of the writ stated, which could only be proved by a writ returnable on the same day. But where the pleadings do not undertake to set out the tenor of the record, and the substance only of the record is stated, there a variance between the allegation and the record will not be fatal, and it will be sufficient if the allegation is substantially proved. Thus in the case of the King v. Lookup, on a prosecution for perjury, where the objection was, that the indictment stated a bill in Chancery to be directed to Robert Lord Henley, &c., and it appeared in evidence to have been directed to Sir Robert Henley, Knight, &c., the Court over-ruled the objection, and held it to be sufficient, that the complainant had preferred a bill before the person who held the great seal, by whichever title he was styled (1). So in the late case of Purcell v. Macnamara (2), in an action for a malicious prosecu-

(1) R. v. Lookup, cit. 1 T. R. 240, 9 East, 163. See also R. v. Payne, cit. 9 East, 158.

(2) 9 East, 157. See also Philips v. Bacon, 9 East, 298.

* Where the circumstance averred in the pleadings, (as of a particular sum or day,) is material, the addition of a *videlicet* will not render the averment immaterial, (Grimwood v. Barrit, 6 T. R. 460, 3); though the omission of a videlicet may *in some cases* make an averment material, which would not otherwise be so. (Symmons v. Knox, 3 T. R. 65, 8.) If therefore the day laid in the declaration be material, it must be proved, notwithstanding that it is laid under a videlicet. It is by no means generally true that the omission of a videlicet will make it necessary to prove the particular sum or day, &c. strictly as laid. Some cases have been already mentioned, where a variance in the proof of such circumstances has been adjudged to be immaterial. (Vid. suprà, p. 161.) It will be sufficient to add one other example. On an indictment for stealing goods in a dwelling-house under the statute 12 Ann. St. 1. c. 7., it is not necessary to prove that the goods were of greater value than 40s., though that may be averred in the indictment without a videlicet. And see R. v. Burdett, 1 Ld. Raym. 149. R. v. Gillham, 6 T. R. 265. Gwinnet v. Philips, 3 T. R. 643. and 2 Campb. 231. Effect of videlicet.

tion, where the allegation was, that the defendant prosecuted an indictment against the plaintiff, until afterwards, sc. on a certain day named, the plaintiff was in due manner acquitted, &c.; and to prove this allegation the record of acquittal was produced, which shewed that the acquittal was on another day, the Court held that the variance was not material, and that the averment had been substantially proved. Here the day was not alleged as part of the description of the record; but the substance of the allegation was, that the plaintiff had been acquitted on the prosecution. And "it was no more necessary," said Mr. Justice Lawrence, "to prove the precise day of the acquittal as laid in the declaration, than it is, upon an indictment for murder or in a declaration upon promises, to prove the precise day, as laid, of committing the murder or of making the promise." In this respect, it cannot be material, whether proof is by matter of record or by parol. If, indeed, the declaration had proceeded to state that the acquittal was on a certain day *as appears by the record*, that might have been considered as descriptive of the record, and then the variance would have been fatal. (1)

Variance in *time*. It is a rule in pleading, that every material fact which is issuable and triable, must be averred to have happened at a certain *time* (2). However it will not generally be necessary to prove the time precisely as laid, unless that particular time is material. Thus in an action on a promissory note, where the declaration states that the defendant on such a day made, &c., proof that he made his promissory note on a different day would be sufficient. So in an action for assault, battery, taking of goods, &c., where the defendant pleads the general issue, the plaintiff will not be confined to the day stated in the declaration, but may prove the assault, &c. on any other day before the commencement

(1) 9 East, 161. And see Turner v. Eyles, 3 Bos. & Pul. 456. Wigley v. Jones, 5 East, 440. Readshaw v. Wood, 4 Taunt. 13. Com. Dig. tit. Record, (C).

(2) 5 T. R. 620.

of

of the action (1). If the defendant justifies by *son assault* on the same day, and the plaintiff traverses the cause of justification, and at the trial the defendant proves the trespass on the same day, there the plaintiff cannot give evidence of an assault on another day (2). And though the defendant should prove the assault of the plaintiff on another day, yet the plaintiff, after having made such a traverse, cannot prove another assault on a different day. (3)

With respect to variances in the *place* laid in the declaration: It has been held, in an action for non-residence, where the parish was described as *St. Ethelburg*, and proved to be *St. Ethelburga*, that the variance was fatal (4): so, in an action of ejectment, where the premises were described as situate in the *united parishes of A and B*, but were proved to be in *the parish of A*, and the two parishes were united only for the single purpose of maintaining the poor (5). But where the premises were described as lying in the *parish of A and B*, and it appeared in evidence that part lay in A and part in B, but that there was no such parish as *the parish of A and B*, the Court held, that the word *parish* was mere surplusage, and that the plaintiff was entitled to recover the lands in B as well as in A (6). So, where the premises were laid to be in the parish of *Farnham*, and were proved to be in the parish of *Farnham Royal*, but it did not appear that there were two *Farnhams*, the Court held that the variance was immaterial (7); so also, in an action for use and occupation, where the premises were proved to lie in the parish of *St. Mary Lambeth*, but

Variance in *place*.

(1) Co. Lit. 282, a, b. 2 Roll Ab. 687, 689. tit. Verdict, (N). Com. Dig. tit. Pleader. (S. 12).

(2) Downes v. Skrymsher, Brownl. 233; 2 Roll. Ab. 687. l 30, S. C.

(3) 2 Roll. Ab. 680, tit. Evidence, (C), Art. 3. Thornton v. Lyster, Cro. Car. 514, *contrà*, (Jones J. doubting), Roll. Ab. Ib. See 2 Saund. 5. note, 3.

(4) Wilson q. t. v. Gilbert, 2 Bos. & Pul 281.

(5) Goodtitle dem. Pinsent v. Lammiman, 2 Campb. 274.

(6) Goodtitle dem. Bremridge v. Walter, 4 Taunt. 671. The case of Wilson v. Clark, therefore, (1 Esp. N. P. C. 273.), seems doubtful.

(7) Doe dem. Tollet v. Salter, 13 East, 9.

were described in the declaration as in the parish of *Lambeth*, which last was the name generally known (1). And this has over-ruled an older case, where a variance between the parish of *Chelsea* and the parish of *St. Luke's Chelsea* was held at nisi prius to be fatal (2). In an action for use and occupation, although it is not necessary to describe where the premises lie (3), yet if they are described in the declaration as situate in a certain parish, and are proved to be in a different parish, the plaintiff cannot recover (4). Where the parish or place mentioned is mere matter of venue, and not of local description, (as, in an action for a nusance defamatory to the plaintiff's character, where the declaration stated, that the defendant erected the nusance, complained of, in *the parish of A*, in a street adjoining to the plaintiff's house, &c.) the actual situation of the house is immaterial, and the plaintiff may recover, though it should be proved that there is no such parish. (5)

The same rule, which has been laid down with respect to civil actions, applies also to the case of an indictment; on the trial of which, it will be sufficient to shew, that the offence was committed in some place within the county or other division; and it seems to be agreed, says Mr. Serjt. Hawkins (6), that *a mistake of the place* in which an offence is laid will not be material upon the evidence on "not guilty" pleaded, if the fact be proved at some other place in the same county. Where a felony is stated to have been committed at a certain place named in the indictment, and there is *no such place* in the county, the indictment is void. (7)

(1) Kirtland v. Pounsett, 1 Taunt. 570.
(2) And see 3 Taunt. 140.
(3) King v. Fraser, 6 East, 348.
(4) Guest v. Caumont, 3 Campb. 235.
(5) Jefferies v. Duncombe, 11 East, 226; 2 Campb. 3, S. C.
(6) B. 2. ch. 25. s. 84.
(7) St. 18 Hen. vi. c. 12. Hawk. ib. See the case of Goodtitle dem. Bremridge v. Walter, *suprà*, p. 165.

SECT.

Sect. VI.

That the best Evidence is to be produced, which the Nature of the Case admits.

The next general rule is, that the best evidence must be given of which the nature of the thing is capable (1). The true meaning of this rule is, not, that courts of law require the strongest possible assurance of the matter in question, but that no evidence shall be given, which, from the nature of the thing, supposes still greater evidence behind in the party's possession or power; for, such evidence is altogether insufficient, and proves nothing, but carries with it a presumption contrary to the intention for which it is produced. Thus, if a party offer a copy of a deed or will, where he is able to produce the original, this raises a presumption, that there is something in the deed or will, which, if produced, would make against the party; and therefore the copy in such a case is not evidence. But, if he prove the original deed or will to be in the hands of the adverse party, to whom he has given notice to produce it, or that the original has been destroyed without his default, no such presumption can reasonably be made, and a copy will be admitted, because then such copy is the best evidence that can be produced (2). For the same reason parol evidence is not admissible to prove the contents of a licence from the crown, though the licence is lost, because there must be some register of it at the secretary of state's office, and that register would be better than parol evidence. (3)

This principle is strongly illustrated by a late case (4), where the question was, whether the defendants had put on board the plaintiff's ship some articles of a combustible

(1) Gilb. Ev. 13. Bull. N. P. 293.
(2) Gilb. Ev. 13. Bull. 293. Garnons v. Swift, 1 Taunt. 507.
(3) Rhind v. Wilkinson, 2 Taunt. 237.
(4) Williams v. East India Company, 3 East, 193, 201.

and dangerous kind, without giving due notice of their nature. It appeared in evidence at the trial, that the goods were delivered by the officer of the defendants, with a written order to the plaintiff to receive them, in which order nothing was said as to their nature, that they were received by the chief mate of the plaintiff's ship, who had since died, and that no other person was present at the time of the delivery. It was further proved, by the captain of the ship and the second mate, that no communication had been made to either of them, nor, as far as they knew, to any other person on board. Upon this evidence, the plaintiff, who had to prove the negative, was nonsuited, on the ground, that he had not given the best evidence of the want of notice, which it was in his power to produce, by calling the company's officer, who delivered the articles on board. And the nonsuit was afterwards affirmed by the Court of King's Bench. "The best evidence, (said Lord Ellenborough in delivering the opinion of the Court,) should have been given, of which the nature of the case was capable. The best evidence was to have been had, by calling, in the first instance, upon the persons immediately and officially employed in the delivering and in the receiving of the goods on board, who appear in this case to have been the first mate, on the one side, and the military conductor the defendant's officer, on the other; and though the one of these persons, the mate, was dead, that did not warrant the plaintiff in resorting to an inferior and secondary species of testimony, (namely the presumption and inference arising from a non-communication to the other persons on board,) as long as the military conductor, the other living witness, immediately and primarily concerned in the transaction of shipping the goods on board, could be resorted to; and no impossibility of resorting to this evidence, the proper and primary evidence on the subject, is suggested to exist in this case."

It has been already observed, that, although the best evidence is to be given which the nature of the case admits, yet

yet the strongest possible assurance of a fact is not required. If a deed, for example, is attested by several subscribing witnesses, the execution may be proved by one of them; or, if none of those witnesses can be produced, proof of the signature of one witness will be sufficient; for the proof is, as far as it goes, complete, and not inferior, in its kind, to any that can be produced; nor, can it be inferred, merely from the absence of further proof of the same kind, that such additional proof would be inconsistent with that already produced. So, to prove the plaintiff's demand satisfied, the defendant may give evidence of an admission by the plaintiff to that effect, though it should appear that the plaintiff also signed a receipt, and it may be said the receipt would be more satisfactory proof (1). And, where an agent for the plaintiff made a verbal agreement with the defendant, and afterwards put it down in writing, which was not signed by the parties, as a memorandum to assist his recollection, such writing is not the best evidence, nor indeed any evidence of the agreement, though it may be used by the agent for the purpose of refreshing his memory (2). So, if parol evidence should be offered to prove a tenancy, it is no objection that there is some written agreement relative to the holding, unless it should appear that the agreement was between the landlord and tenant, and that it continued in force to the very time, to which the parol evidence applies (3). And in a great variety of cases, which have been before mentioned, *primâ facie* or presumptive proof is admissible, although perhaps stronger evidence might have been produced.

Upon the same principle, it will not be necessary to call the supposed writer of an instrument, for the purpose of proving or disproving his hand-writing; but the evidence of persons well acquainted with the character of his writing

(1) Jacob v Lindsay, 1 East, 460. Smith v. Young, 1 Campb. 439.

(2) Dalison v. Stark, 4 Esp. N. P. C. 163. 1 East, 460.

(3) Doe d. Wood v. Morris, 12 East, 237. Doe v. Pearson, 12 East, 239. n.

will

will be sufficient. Such evidence is not, in its nature, inferior or secondary; and though it may generally be true, that a writer is best acquainted with his own hand-writing, yet his knowledge is acquired precisely by the same means as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of an inferior or secondary species; nor does it give any reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true. It is the common practice to receive such testimony in ordinary cases; and, in prosecutions for capital offences, it must be equally admissible. On a prosecution for the forgery of a bank note (1), therefore, Mr. Justice Le Blanc held that the signature in the name of the cashier of the bank might be disproved by any other person, who was acquainted with his hand-writing, though the cashier himself was not an incompetent witness. (2)

The rule, which requires the best evidence to be produced, is dispensed with in some particular cases.

First, where it is necessary to prove an entry in a public book, the original need not be shewn; but, for the convenience of the public, a sworn copy will be admitted. (3)

Secondly, in the case of all peace-officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in these characters, without producing their appointments (4). And in the case of officers of any branch of the revenue, where the question is whether they are such, proof of being reputed to be so, or of having exercised the office,

(1) Hughes's case, 1802, 2 East, P. C. 1002; M'Guire's case, 1801, S. P, ib. Contra, Smith's case, 1768, 2 East, P. C. 1000. See *post.* as to proof of hand-writing.

(2) Newland's case, 2 East, P. C. 1001.

(3) See part 2. ch. 6. *ad finem.*

(4) By Buller J. in Berryman v. Wise, 4 T. R. 366. By the opinion of all the judges in the case of the Gordons tried for murder in 1789, Leach Cr. C. 585.

is good evidence of the fact, on any indictment, information, action, or prosecution whatsoever (1). So, on an indictment for perjury committed by the defendant before a surrogate in an ecclesiastical court, proof that the person, who administered the oath, acted as surrogate, has been held to be sufficient *primâ facie* evidence of his appointment and authority. (2)

Thirdly, there are other instances in which strict proof is made unnecessary, because the party, against whom it would otherwise be requisite to produce proof of the particular fact, has by his conduct precluded himself from disputing the fact (3). Such is the rule in an action against clergymen for non-residence, in which it is reasonable, that the acts of the defendant as parson, and his receipt of the emoluments of the church, should be evidence against him of his being parson, without formal proof of the defendant's title (4). So, in an action by a person, as farmer and renter of tolls, appointed under an act of parliament, for tolls due at a turnpike-gate, although the plaintiff will not be entitled to recover on the special count, unless he has been legally appointed collector of the tolls, yet, if the defendant has accounted with him in that character, the want of a formal appointment will not preclude him from recovering on an account stated (5). So, a tenant is considered as admitting the title of the landlord, under whom he holds, and will not be permitted afterwards to dispute it.

This principle was carried farther in the case of Radford q. t. v. M'Intosh; too far indeed, in the opinion of one learned Judge (6). That was an action for penalties under the post-horse act, brought by the plaintiff as farmer-general, and proof of his appointment was dispensed with, be-

(1) St. 26 G. 3. c. 77. s. 13., and see St. 11 G. 1. c. 30. s. 32.

(2) R. v. Verelst, 3 Campb. 432.

(3) By Chambre J., Smith v. Taylor, 1 Bos. & Pul. N. R. 210.

(4) By Chambre J., ib. Bevan q. t. v. Williams, n. (a), 3 T. R. 635.

(5) Peacock v. Harris, 10 East, 104.

(6) Chambre J. 1 Bos. & Pul. N. R. 211.

cause

cause the defendant had previously accounted with him as farmer-general (1). So, in an action for subtraction of tithes, proof of the defendant's former acknowledgment of the plaintiff's title to the tithes is sufficient evidence, as against the defendant a wrong-doer (2). So, in an action against the defendant for slander, in charging the plaintiff with being a swindler, and threatening that he would have him struck off the roll of attornies, the Court was of opinion, that the defendant's threat amounted to a distinct acknowledgment that the plaintiff was an attorney, and dispensed with further proof (3). The principle to be extracted from these cases seems to be, that where a defendant, in the course of the transaction, on which the action is founded, has admitted the title, by virtue of which the plaintiff sues, it amounts to *primâ facie* evidence, that the plaintiff is entitled to sue (4). And upon this principle two of the Judges of the Court of Common Pleas were of opinion that the plaintiff was entitled to recover in the case of Smith v. Taylor (5). That was an action for defamation, in which the plaintiff averred, that he was a physician and exercised the profession, and that the words were spoken concerning him as a physician. The material facts of the case were shortly these; the plaintiff, having practised the profession of a physician, was called upon to attend a sick person, for whom he prescribed; the defendant was employed as apothecary, and made up the prescription; in this situation of things, the defendant spoke the words charged in the declaration, which did not impute to the plaintiff any want of qualification by degree, but called him by his professional title of doctor, and ascribed to him mal-practice in his treatment of the patient. "The question," said the Chief Justice, "is, whether, in this particular action upon these particular words, the evidence offered was not sufficient

(1) 3 T. R. 632. And see Cross v. Kaye, 6 T. R. 663, and 1 New Rep. 211.

(2) 1 Bos. & Pul. N. R. 210. 3 T. R. 635. 4 T. R. 366. 4 Gwill. 1483.

(3) Berryman v. Wise, 4 T. R. 366.

(4) By Heath J. 1 New Rep. 208.

(5) 1 New Rep. 196, Mansfield C. J. and Heath J.; Rooke J., and Chambre J., *contrà*.

primâ

primâ facie evidence that the plaintiff had lawfully practised as a qualified authorised doctor of physic? And considering the nature of the words and the situation of the defendant, that the charge had no relation to the want of qualification but merely to the practice, and that it was accompanied by the expression "Dr. S.," I think that these circumstances afforded sufficient *primâ facie* evidence that the plaintiff was doctor." If, indeed, the words imply a charge that the plaintiff was not *qualified* to act in the particular character which he assumed, he ought to prove his qualification, and it will not be sufficient to shew that he acted in that capacity (1). And where the words imply merely ignorance or negligence, without admitting the plaintiff to be qualified, and the plaintiff avers that he is qualified, he will be bound to prove his qualification. (2)

Sect. VII.

That Hearsay is not Evidence.

It is a general principle in the law of evidence, that, if any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to speak the truth; and the reason of the rule is, because evidence ought to be given under the sanction of an oath, and that the person, who is to be affected by the evidence, may have an opportunity of interrogating the witness as to his means of knowledge and concerning all the particulars of the fact.

Hearsay evidence of a fact, therefore, is not admissible. And the same principle is applicable to statements in writing, no less than to words spoken: whether spoken or written, they are equally inadmissible in evidence. The

(1) Pickford v. Gutch, 8 T. R. 305, n. (a); Moises v. Thornton, 8 T. R. 303. In this last case, there was also an averment, that the plaintiff (*had taken the degree of doctor of physic*) was duly qualified.

(2) See 1 New Rep. 204. 210.

only

only difference between them in this respect is, that there is a greater facility of proof in the one case than in the other; a written account is proved to be genuine, by proof of the hand-writing; but the genuineness of mere oral declarations must depend upon the memory and accuracy of the witness, who professes to repeat them.

Exceptions.

To this general rule there are some exceptions, which will be separately considered.

In case of *pedigree, &c.*

First, with regard to hearsay on questions of pedigree. "On inquiring into the truth of facts, which happened a long time ago, the courts have varied from the strict rules of evidence applicable to modern facts of the same description, on account of the great difficulty of proving those remote facts in the ordinary manner, by living witnesses. On this principle, hearsay and reputation (which latter is the hearsay of those who may be supposed to have known the fact, handed down from one to another,) have been admitted as evidence in cases of pedigree (1)." Thus, declarations of deceased members of the family are admissible evidence to prove relationship, as, who was a person's grandfather, or whom he married, or how many children he had, or as to the time of a marriage or of the birth of a child, and the like, "of which it cannot be reasonably presumed, that better evidence is to be procured." In ancient times, while the feudal system prevailed, great facilities of establishing descents were afforded by means of inquisitions post mortem. The heads of families, upon these occasions, made solemn declarations, which were preserved as matter of record (2). But, these having now grown into disuse, it is often extremely difficult to prove a pedigree; and recourse must be had, from necessity, to the best evidence, that the nature of the subject will admit.

(1) Per Le Blanc J. in Higham v. Ridgway, 10 East, 120. And see the Chancellor's judgment in the case of Vowels v. Young, 13 Ves. jun. 143.

(2) 13 Ves. jun. 143.

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In a late case, proof by one of the family, that a particular person had many years before gone abroad, and was supposed to have died there, and that the witness had not heard in the family of his having married, was considered by the Court of King's Bench, good primâ facie evidence of the person's death without lawful issue. (1)

It is not, however, every statement or tradition in the family, that can be admitted in evidence. "The tradition," said Lord Eldon in the case of Whitlocke v. Baker (2), "must be from persons having such a connection with the party to whom it relates, that it is natural and likely from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. Declarations in the family, descriptions in wills, descriptions upon monuments, in bibles and registry books, are all admitted upon the principle, that they are the natural effusions of a party, who must know the truth, and who speaks upon an occasion, when his mind stands in an even position without any temptation to exceed or fall short of the truth." Lord Thurlow appears to have adopted the rule with the same limitations. It was his opinion, (as the Chancellor stated in the late case of the Berkeley peerage, where this subject was much discussed,) that declarations made for the express purpose of being given in evidence, on a question of pedigree, could not be received. If, for example, he said, a person were to take up his family bible, and, conceiving the idea of its being afterwards produced in evidence, were to write down *uno flatu* the births and deaths of his children, such an entry would not be admissible.

Descriptions in family bibles have been mentioned only by way of example. The admissibility of such entries, it is scarcely necessary to observe, can in no degree depend

(1) Doe dem. Banning v. Griffin, 15 East, 293.

(2) 13 Ves. 514.

upon

upon the circumstance of their being inserted in the family bible, though on that account the statement may be entitled to greater consideration. A memorandum inserted in any other book, by one of the family, may be given in evidence. So, a will by an ancestor is evidence on a question of pedigree, (though it be found cancelled, and not known to have been proved or acted upon,) if it appears to be treated as a paper relating to the family (1). And recitals in family deeds, monumental inscriptions, engravings on rings, old pedigrees hung up in a family mansion, and the like, (in which it is improbable that a description would be suffered to continue, if erroneous,) are all of them admissible upon the same principle. (2)

Declarations made by a deceased husband, as to the legitimacy of his wife, are evidence, though he was not related to her by blood: for the husband must be supposed to have more intimate knowledge, on that subject, than a distant relation (3). But the opinion of deceased neighbours, or of acquaintances of the family, are not evidence on a question of pedigree (4); nor is the hearsay of a relative to be admitted, when the relative himself can be produced. (5)

The declarations of a deceased member of the family are not to be admitted, unless, as was before mentioned, they have been made under circumstances, when the relation may be supposed without an interest and without a bias. If they were made on a subject in dispute, after the commencement of a suit, or after a controversy preparatory to one, they ought not to be received in evidence, on account of the probability, that they were partially drawn from the deceased, or perhaps intended by him, to serve one of the

(1) Doe d. Johnson v. Lord Pembroke, 11 East, 505.
(2) 13 Ves. jun 144. Bull. N. P. 233. Cowp. 594. 10 East, 120.
(3) Vowles v. Young, 13 Ves. jun. 148.
(4) 13 Ves. jun. 147. 514. 3 T. R. 723. See Bull. N. P. 295. 1 Maul. & Sel 689. 14 East. 330.
(5) Pendrel v. Pendrel. 2 Str. 924. Bull N. P. 113. Harrison v. Blades, 3 Campb. 457.

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contending parties. There has been some difference of opinion on this subject. In a case, reported in Viner's Abridgment (1), Ch. B. Reynolds refused to admit declarations, which had been made at a time when the point had become the subject of controversy. On the other hand such evidence was received by Lord Camden (2); and Lord Mansfield in the case of Goodright on the demise of Stevens v. Moss (3) was of opinion, that an answer * by a deceased mother to a bill filed against her, stating the time of a child's birth, might be admitted as evidence on the footing of a declaration. On the trial of the cause, Mr. Baron Eyre rejected this answer, together with the general declarations of the father and mother; in consequence of which, an application was made to the Court of King's Bench for a new trial. Lord Mansfield, on that occasion, considered the rejection either of the general declarations or of the answer to be a sufficient ground for a new trial: but he adverted more particularly to the former; and it does not appear from the report, that he laid any great stress on the rejection of the answer. Mr. Justice Aston concurred with Lord Mansfield in opinion, that the general declarations ought to have been admitted, but delivered

(1) Dev. Sp. Ass. 1731, Vin. Ab. Ev. [T. b. 91.]

(2) Hayward v. Firmion, cor. Lord Camden, Sitt. after Tr. term 1766, cited by Lawrence J. in the Berkeley peerage case; and see Nichols v. Parker, Exr. Sp. Ass. 1805, 14 East, 331. *n.*

(3) Cowp. 594.

* The answer is described by the reporter of this case as an answer in Chancery. It appears from an inquiry, which was made in the case of the Berkeley peerage, that proceedings had been instituted in the Court of Chancery, and that afterwards a bill was filed in the Exchequer, by the youngest son, claiming as a legitimate child, against the mother who was administratrix of her deceased husband. The mother in her answer averred, that the complainant was born before marriage and illegitimate. Now as she was entitled as administratrix to a distributive share of the husband's effects, and was therefore interested to defeat the right of any other persons, who might claim a part under the distribution, her answer most clearly ought not to have been admitted. This objection however was not adverted to; nor does it seem to have occurred, that the statement in the answer was inadmissible, as having been made after the commencement of a suit.

no opinion on the other point. Thus, the authorities on this subject appear to have been, at one time, nearly evenly balanced.

Great light has been thrown upon this subject by the opinions of many of the Judges in the late case of the Berkeley peerage(1). A question was on that occasion proposed to the Judges (2), in the following terms: "Upon the trial of an ejectment respecting Black Acre between A and B, (in which it was necessary for A to prove that he was the legitimate son of J S,) A, after proving by other evidence that J S was his reputed father, offered to give in evidence a deposition made by J S in a cause in Chancery, instituted by A against C D in order to perpetuate testimony to the alleged fact (disputed by C D), that he was the legitimate son of J S, in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by C D. B, the defendant in the ejectment, did not claim Black Acre under either A or C D, the plaintiff and defendant in the Chancery suit. According to law, could the deposition of J S be received in evidence upon the trial of such ejectment against B, as evidence of declarations of J S, the alleged father, in matters of pedigree?" The Judges present afterwards stated their opinions at length, and, with only one dissentient voice, agreed in considering the deposition of J S to be inadmissible. "The ground," said Mr. Justice Lawrence in delivering his opinion, "upon which the declarations of deceased members of the family are admitted in evidence in matters of pedigree, is the necessity of the case. But as the first object is to administer justice with as much certainty as possible, it is reasonable that only such declarations should be received, as have in their favour a presumption of being consistent with the truth. This presumption must depend upon circumstances; and if the relator has no inte-

(1) May 13, 1811. MS. See also the case of the Banbury peerage claim, 1809, 2 Sel. N. P. 684.

(2) May 2, 1811. MS.

rest

rest to serve, nor any object to answer, as may be the case where declarations are made subsequent to the commencement of a suit, and if there is no ground for supposing that the relator's mind has any bias, it is not unreasonable to conclude, that he has neither exceeded nor stopped short of the limits of truth. In such a case, therefore, the admission of these declarations, though without the sanction of an oath and without any opportunity of cross-examination, may be attended with less inconvenience than would follow from the total rejection of the evidence. But mischievous indeed would be the admission of such evidence, even with the usual sanction of an oath, if the declarations were made under that bias or feeling of interest, which may be expected to arise in the course of a controversy." For these reasons the deposition was not admissible as a declaration. Nor could it be admitted, as the answer of a witness in a judicial proceeding. "For a deposition," continued Mr. Justice Lawrence, "is the answer of a witness to such interrogations, as a litigating party suggests for the purpose of establishing certain facts, and is considered to be a partial representation, as against all persons who have no opportunity of drawing out the whole truth by cross-examination on this account, it ought not to be received as evidence against a stranger."

So, where the question was, whether the occupier of a particular farm was liable to the repair of a public road, and, to prove the affirmative, an award was produced, (which had been made some years before, when the same question was the subject of dispute between a former occupier and the township, where the lands were situated,) this evidence was rejected as inadmissible; on the ground, that the account, which deceased witnesses might have given to the arbitrator on that occasion, could not have been received, as the declarations were made *post litem motam*, and that the opinion of the arbitrator, formed upon such testimony, could not be entitled to more credit (1). And upon the

(1) R. v. Cotton, 3 Campb. 444. cor. Dampier J.

same principle, it should seem, depositions on a question of custom would not now be admitted in evidence against a person not claiming under any of the parties to the suit, in which the depositions were taken.

Hearsay as to *time of birth.*

On a question, whether a testator at the time of making his will was of full age, a written memorandum by his deceased father, stating the time of his birth, has been admitted to be good evidence (1). Here the controversy was not, as in a question of pedigree, from what parents he derived his birth, but at what precise time an undisputed birth had happened. Still however the observation, before made, applies to this sort of evidence, namely, that the father had peculiar means of knowing the fact in dispute without any interest to misrepresent it, and the fact itself was not a matter of notoriety, but necessarily lying within the knowledge of a few individuals of the family. So, on a question of legitimacy, the declarations of deceased persons, supposed to have been married, (who might themselves be examined if alive,) are admissible to disprove the fact of marriage. (2)

As to *place of birth*, &c.

The declarations of a deceased parent, though they are evidence of the *time* of a child's birth, will not be admitted as evidence of the *place* of the birth (3). "The point in dispute (said Lord Ellenborough, in a case where the admissibility of such evidence was discussed,) turns on a single fact involving only a question of locality, and therefore not falling within the principle of the rules applicable to cases of pedigree." Nor can the declarations of a father or mother be received after their deaths to prove the want of access, so as to bastardize a child born during the marriage; for they could not be examined to that fact, if alive (4):

(1) Herbert v. Tuckal, Tr. at bar, Sir T. Raym. 84 cited in Brune v. Rawlins, 7 East, 290; and see 10 East, 120.

(2) R. v. Bramley, 6 T. 330. May v. May, 1762, Tr. at bar, Bull. N. P. 112.

(3) R. v. Erith, 8 East, 542.

(4) R. v. Reading, Rep. temp. Hard. 79; Bull. N. P. 113. S. C. Stevens v. Moss, Cowp. 592. R. v. Luffe, 8 East, 203. R. v. Kea, 11 East, 133.

and,

and, even if that objection were removed, still, the case would not come within the principle, on which such hearsay evidence can be made an exception to the general rule; as want of access (1), implying the continued separation of the parties, must be notorious to the whole neighbourhood, where they have resided, and is therefore capable of a more satisfactory proof. For the same reason, the declaration of a deceased person, as to having been relieved by a parish (2), or as to being hired for a year (3), are not evidence of those facts, on an appeal against an order of removal.

The case, where the declaration of a parent was received as evidence of the time of a child's birth, has been before mentioned. From analogy to this, the declaration or written memorandum of a deceased surgeon, respecting the time of a birth at which he attended, appears to be evidence, as it was made on a matter peculiarly within his knowledge (4). And, for the same reason, the account, which a deceased person has given respecting his own bodily state during illness, or immediately after an injury, is admissible (5). In the case of Aveson v. Lord Kinnaird (6), which was an action upon a life-insurance of the plaintiff's wife, and where the question was, whether her life was in an insurable state, the account which she gave of herself, explaining her appearance, in answer to inquiries a few days after the certificate of her health had been obtained, and her account also of the state, in which she had previously been at the time of obtaining the certificate, were received at the trial, and afterwards adjudged by the Court of King's Bench to be admissible evidence, for the purpose of shewing that the wife was not in the

(1) Bull. N. P. 113.
(2) R. v. Chadderton, 2 East, 29.
(3) R. v. Nuneham Courtney, 1 East, 373. R. v. Ferry Fristone, 2 East, 55. R. v. Abergwilly, 2 East, 63.
(4) See 10 East, 120. and Vin. Ab. Ev. T. b. 91.
(5) Aveson v. Lord Kinnaird, 6 East, 193, 198. Thompson and Wife v. Trevannion, Skin. 402.
(6) 6 East, 188.

state of health described in the certificate. The substance of the conversation was, that she had continued ill from the time of obtaining the certificate down to the time when the conversation took place; and the declarations were held to be admissible, in the first place, as shewing the opinion, which the deceased had of her own state of health, when the certificate was made out; and secondly, they were properly received, as evidence to contradict a surgeon, who had been called on the part of the plaintiff. So, to prove seisin in a devisor, the declarations of a deceased occupier of the land in question, that he held as his tenant, were received as evidence of that fact (1). Without such evidence it might have been impossible to prove an occupation by the deceased tenant under a particular person, though the simple fact of his occupation must have been capable of other proof; and, in addition to the circumstance of his having a peculiar knowledge of the fact, it may be observed, that the declaration was in some degree against his interest, since, in case of an action by his landlord, it might have been produced as evidence against him, or against any claiming under him (2). For the same reason, where the point was, whether certain lands were parcel of A's or B's estate, the declarations of a deceased occupier, who held under both A and B, have been admitted in evidence. (3)

As to custom, &c.

In questions upon a boundary between parishes or manors (4), or on a customary right (5), or on parochial or manorial customs (5), declarations as to the common opinion of the place, made by deceased persons, who from

(1) Holloway v. Rakes, cited by Buller J. in Davies v. Pierce, 2 T. R. 55. Uncle v. Watson, 4 Taunt. 16.

(2) Uncle v. Watson, 4 Taunt. 16.

(3) Roll v. Fellow, cor. Lord Hardwicke C. J. Exr. Sp. Ass. 1735, Vin. Ab. Ev. [A. b. 38.] pl. 10. Sir J. Bridgman v. Jennings, 1 Ld. Raym. 734. Davies v. Pierce, 2 T R. 53.

(4) Nichols v. Parker, 14 East, 331. n.

(5) Denn v. Spray, 1 T. R. 466. Beebee v. Parker, 5 T. R. 26, 31. Chapman v Smith, 3 Gwill. 854. 2 Ves. 512. S. C. Doe d. Allason v. Sisson, 12 East, 62. Morewood v. Wood, 14 East, 327. n. Nichols v. Parker, ib. 331, n. And see Weeks v. Sparke, 1 Maul. & Sel. 679. 684. 686; Harwood v. Sims, 1 Wightw. 112.

their

their situation had the means of knowledge and no interest to misrepresent, have been generally considered admissible evidence. So, perambulations are evidence of the extent of a particular parish or manor; since it may be inferred that those, who perambulated, believed the line of their perambulation to be the boundary of the district, and such acts are in some measure an exercise of the right (1). Such evidence has been admitted from analogy to cases of *public rights*, in which it is clearly established that reputation is admissible. A right of common by custom is, strictly speaking, a private right; but it is a *general* right, and therefore (so far as it regards the admissibility of this species of evidence) has been considered as *public*, because it affects a large number of occupiers within a district. But it is to be observed, the evidence is to be confined to what such old persons have said, as were in a situation to know what the rights were; and before a customary right can be proved by such evidence, a foundation ought to be laid by shewing an exercise of the right, or acts of enjoyment within the period of living memory; it is the exercise of the right, that lets in the evidence of reputation. (2)

These declarations of deceased persons as to boundaries or customs, &c. ought to come from persons who had no interest to misrepresent; if they appear to have had any interest to make evidence for themselves or for others, what they said will not be evidence. Any declarations, that they made *post litem motam*, seem not to be admissible (3). But, unless there should appear to be a *lis mota* it will not be enough, for the purpose of excluding their declarations, to shew that they claimed themselves under the same custom. This kind of evidence, therefore, has been received on a question of parochial modus, though

(1) 1 Maul. & Sel. 687. 689 and see *infrà*, p. 194.

(2) 1 Maul. & Sel. 689. 690. 12 East, 65. 14 East, 330.

(3) See *suprà*, p. 179, 180.

the deceased was a parishioner, and liable to pay tithe(1); so also, on a question of parochial or manorial boundary, although the persons, who had been heard to speak of the boundary, were parishioners, and claimed rights of common on the very wastes, which their declarations had a tendency to enlarge. (2)

Although, on a question of boundary or custom, the general opinion of the place is evidence of the general right, yet the tradition of a *particular fact*, (as, that such a turf was dug, or such a post put down in a particular spot, &c.) said to have been done in the exercise of that right, will not be evidence (3); for the fact, which is the subject of tradition, may have been done under a licence from the very persons, against whom or against whose privies, &c. the right is afterwards claimed; and, in general, single facts are so frequently misrepresented or misreported, either from intention or from ignorance, and the various circumstances, which have accompanied a fact, and which may be essentially characteristic, are often so little known, or, if known, are so likely to pass unobserved, and to be forgotten in the course of time, that no credit can safely be given to such a tradition. Thus, on a question of parochial modus, evidence that a particular person, since deceased, paid a certain sum in lieu of tithes would not be admissible; but if the witness says, he has heard from old inhabitants, that so much per acre was always paid in lieu of the tithes, that will be good evidence; for it does not consist of hearsay of a particular fact, but comes within the general rule of evidence of reputation. (4)

Rector's books, old leases, &c.

Entries made by a deceased rector in his book, of the receipt of ecclesiastical dues, have been in several cases admitted as evidence for his successor; because, it is said, he

(1) Harwood v. Sims, 1 Wightw. 112.
(2) Nicholls v. Parker, 14 East, 331; tried before Le Blanc J. 1805.
(3) 3 T. R. 709. 5 T. R. 123. 14 East, 330, 1. 1 Maul. & Sel. 687.
(4) Harwood v. Sims, 1 Wightw. 112.

he had no interest to mistate the fact, in making an entry, which could not possibly be evidence for himself (1). "This, as Lord Hardwicke once said (2), is going a great way, but has been allowed, because the parson knows, that his entry cannot benefit either himself or his representative, who has nothing to do with the living; and it is not to be presumed, that the parson would make false entries for his successor, who stands indifferent to him *." The cases however have gone still further; and similar entries, made by impropriate rectors, have been received as evidence for their successors, although objected to as coming from the owners of the inheritance (3). So, in a case where a question arose between an impropriate rector and a vicar respecting agistment tithe, the Court of Exchequer held that the books of a lessee of the rectory, stating the receipt of such tithe, were evidence, after the determination of their lease, for the impropriator (4); and entries by the steward of a former owner of the estate, containing an account of payments to the vicar in lieu of the tithes of particular lands, have been admitted as evidence for a succeeding owner against the impropriator (5). In the late case of Perigal v. Nicholson and others (6), on a bill for tithes filed by the vicar against the defendants, who insisted upon a modus for *hay and agistment*, the Court of

(1) 7 East, 290.
(2) 2 Ves. 43.
(3) Anon. case, Bunb. 46. Anon. case, cor. King C. J. Vin. Ab. Ev. T. b. 73, and T. b. 117, art. 3. Illingworth v. Leigh, 4 Gwill. 1618. Woodnoth v. Ld. Cobham, 2 Gwill. 653; Bunb. 180, S. C.
(4) Illingworth v. Leigh, 4 Gwill. 1618.
(5) Woodnoth v. Lord Cobham, 2 Gwill. 653.
(6) 1 Wightw. 63; Wood B. dissenting.

* Such evidence is said to have been refused in Le Gross v. Levemoor, 2 Gwill. 527; has been mentioned as a singular exception by Ld. Kenyon in Outram v. Morewood, 5 T. R. 123; was disapproved of by Wood B. in Perigal v. Nicholson, 1 Wightw. Rep. 63, also by Price B. in Woodnoth v. Ld. Cobham, 2 Gwill. 653. King C. J., in a case before him in 1719, said, this evidence had been received *per cursum Scaccarii*, though he could not give a reason for it; Vin. Ab. Ev. (T. b. 73.)

Exche-

Exchequer admitted, as evidence for the plaintiff, an entry in the parish register, stating, that various moduses were due from the different townships of the parish for *hay only*, in which entry the sum total of all the moduses was in the handwriting of a preceding vicar, but it did not appear by whom the other part of the entry had been made. The majority of the Court held, as the report states, that the entry was admissible, upon the ground, that the vicar had no interest beyond his incumbency, and there did not appear to be any dispute at the time, or previously, respecting these tithes; and this entry, by admitting a modus in one article, was in abridgment of the rights of the vicar, and it was the application only which now accidentally became favourable to his successor.

The cases in which rector's books have been received as evidence, in favour of a succeeding rector, against a stranger, appear to be very distinguishable from the cases before cited, in which the declarations or written entries were made by deceased persons, peculiarly if not exclusively acquainted with the fact. The utmost to be said of these, is, that the declarations generally related to old facts, and were made by persons who could not have used them in their own favour; and the same may be said of a great variety of cases, in which the declarations of deceased persons have been uniformly rejected. The objection against hearsay (under which title such entries must be classed, for with respect to their *admissibility* it is not material, whether the declarations were written or merely spoken,) is, not that the person, who asserted the fact, might have been interested to misrepresent it, but that the assertion was made not under the sanction of an oath, and that the party, against whom the evidence is offered, had no opportunity of questioning the person as to the supposed fact. Here, the declarations were not *against* the interest of the person who made them, and were produced against a stranger; and further, the rights sought to be

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established by such declarations were in their nature capable of various other kinds of proof.

Old leases and old rent-rolls have been received in evidence, in favour of a party claiming under the lessors (1). And, on a question, whether certain lands, which had been approved from a waste, were subject to a right of common, several counterparts of old leases kept among the muniments of the lord of the manor, by which the land appeared to have been demised by the lord free from any such charge, were allowed to be evidence for the plaintiff, who claimed under the lord of the manor, against the defendant in trespass who justified for common of pasture, though possession under the leases was not shewn; the leases being so old, that no person could speak to possession under them (2). So, where the question was, whether the plaintiffs were entitled to a prescriptive right of exclusive fishery in a navigable river, which they claimed under the lords of the manor, they were allowed to give in evidence old entries of licences on the court rolls of the manor, stating that the lords of the manor had the several fishery, and had granted the liberty of fishing for certain rents; nor was it thought necessary to prove payment under these licences, as they were of such an ancient date, that evidence of payment could not reasonably be expected (3). The old licences were, therefore, admitted; but it was added, that they would not be entitled to any weight, unless payment under similar licences could be proved in later times, or that the lords of the manor had exercised other acts of ownership, which had been acquiesced in.

A survey of a manor or estate, made by the owner, is not evidence against a stranger, in favour of a succeeding owner, that particular lands are parcel of the estate (4).

(1) Newburgh v. Newburgh, Vin. Ab. "Evidence," T. b. 43. 3 Brown. Parl. Cases, 553, last edit. Per Heath J. in 1 Campb. 309.

(2) Clarkson v. Woodhouse, 5 T. R. 412, (*a*).

(3) Rogers and others v. Allen, 1 Campb. 309, before Heath J.

(4) Anon. 1 Str. 95.

But

But a survey, which was delivered by the owner to a purchaser of part of his estate, would be evidence against such former owner and against a purchaser of the other part; as in the case of Bridgman v. Jennings (1), where Lord Holt ruled, that if A be seised of the manors of B and C, and during his seisin of both he causes a survey to be taken of the manor of B, and afterwards the manor of B is conveyed to E, and afterwards there are disputes between the lords of the manors of B and C about their boundaries, that this old survey may be given in evidence: but it would be otherwise, said Lord Holt, if the two manors had not been in the hands of the same person at the time when the survey was taken. A survey, then, which has been made by a former owner of the estate, is not evidence of the locality or identity of land against any person, who was a mere stranger to the survey.

So, in the case of Outram v. Morewood (2), (where one of the points to be established was, whether certain lands, described in ancient title deeds, were the same, for which certain rents had been at several times paid,) the Court of King's Bench determined, that entries, made by a deceased person, under whom the defendant claimed, acknowledging the receipt of rent for the premises in question, were not admissible evidence for the defendant. Lord Kenyon on that occasion said, "This is distinguishable from all the cases cited. In those, something was produced in respect of the interest of the party; and what the party did or said may be evidence against himself. But here, the entry was a mere private memorandum, to remind the person that he had received the rent, and cannot be admitted to decide the right between these parties. Evidence of this kind can only be admitted to restrain, not to advance, the interest of the party who makes it. What a man does in his closet ought not to affect the rights of third persons. There is

(1) 1 Ld. Raym. 734. Gilb. Ev. 70. And see Davies v. Pierce, 2 T. R. 53, cited *suprà*, p. 182.

(2) 5 T. R. 123. And see Lord Pomfret v. Smith, 7 Brown P. C. 5 T. R. 413. n.

only

only one instance in which this is allowed, namely, the books of an incumbent respecting his tithes. But that has been always considered an excepted case." "The general rule, said Lord Hardwicke (1), in the case of Glyn v. The Bank of England, is, that a man cannot make evidence for himself. What he writes or says for himself cannot be evidence of his right, and consequently cannot be for his representative claiming in his right and place. I will not say, (added Lord Hardwicke) how length of time may vary it; but otherwise, it cannot be, any more than for himself."

Hearsay as to *public rights.*

In questions concerning public rights, common reputation is admitted to be evidence; for such rights, being matters of public notoriety and of great local importance, become a continual subject of discussion in those parts of the country, where all have the same means of information and the same interest to ascertain the claim (2). Thus, for example, if a question should be raised, whether a corporation has a prescriptive right to collect tolls on a public navigation, it would be good evidence to show, that deceased persons have been heard to acknowledge the right, and to declare that they had been so informed by their predecessors. The same reason applies, in a less degree, to questions respecting general customs, which concern parishes, or manors, or the inhabitants of towns and other places (3). In such cases, general reputation is some evidence of a right beyond the memory of living witnesses, and thus tends to support the modern usage.

Hearsay as to *private rights.*

With respect to the admissibility of common reputation, as evidence of prescriptive rights strictly *private*, there has been considerable doubt. In one of the latest cases on this subject (4), where, on a motion for a new trial, the

(1) 2 Ves. 43.

(2) Morewood v. Wood, 14 East, 329. See Weeks v. Sparke, 1 Maul. & Sel. 679, 685.

(3) 14 East, 327. See *suprà*, p. 183.

(4) Morewood v. Wood, 14 East, 327. Ld. Kenyon C. J. and Ashurst J. against the evidence; Buller J. and Grose J. for it.

question

question was, whether such evidence ought to have been received, as evidence of a prescriptive right of digging stones on a waste, the Court of King's Bench was equally divided. A book of authority lays it down broadly, that "in questions of prescription it is allowable to give hearsay evidence, in order to prove general reputation: and that therefore, where the issue was on a right of way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was acknowledged (1)." But, on the other side, there are many great authorities against receiving this kind of evidence (2). And there appears to be good reason for the distinction. For, where individuals claim merely a *private* right, other people have not the same means of knowing it, nor, if they had, would they have the same interest to examine it. How, for instance, can the common belief among the inhabitants of a parish supply any kind of information, on a question of right of way claimed by an individual over a particular field (3)? In such cases, common reputation appears to give no satisfactory information, and to be inapplicable to the point in issue. In the case of Weeks v. Sparke (4), the last reported case on this subject, which was an action for a trespass on the plaintiff's close, *parcel of a common*, &c. the defendant justified for a prescriptive right of common at all times over the place, &c.; and the plaintiff in his replication prescribed to use the place for tillage, &c. qualifying the defendant's general right; to support this prescriptive right of tillage, the plaintiff offered evidence of reputation, which was received at the

(1) Bull. N.P. 295. And see the opinions of Buller J. and Grose J. in Morewood v. Wood, 14 East, 330, n.; 3 T. R. 709. See also Webb v. Petts, Noy. 44, where the Court agreed that proof by hearsay, of a modus for a particular farm, was admissible.

(2) Lord Kenyon in Reed v. Jackson, 1 East, 357. Lord Kenyon and Ashurst J. in Morewood v. Wood, 14 East, 329. Lord Kenyon in Withnell v. Gartham, 1 Esp. N. P. C. 324. See also Clothier v. Chapman, 14 East, 331, n. before Graham B.; Didsbury v. Thomas, 14 East, 323; Barnes v. Mawson, 1 Maul. & Sel. 81.

(3) See 1 Maul. & Sel. 691.

(4) 1 Maul. & Sel. 679. See City of London v. Clerke, Carth. 181.

trial;

trial; and the Court of King's Bench were of opinion, that it had been properly admitted, on the ground, that the right claimed by the plaintiff, although claimed by prescription, yet was an abridgment of the general right of common over the waste, and affected a large number of occupiers within the district.

It has been said, indeed, that in the case of the Bp. of Meath v. Lord Belfield (1) in a quare impedit, after the plaintiff had given in evidence an entry, in the register of the diocese, of the institution of one K, (in which entry there was a blank, where the patron's name is usually inserted,) parol evidence of the general reputation of the country was offered, that K was in by the presentation of one, under whom Lord Belfield claimed; and that, upon a bill of exceptions, this evidence was adjudged to be admissible, on the ground that a presentation may be by parol, and what commences by parol may be transmitted to posterity by parol, and that this creates a general reputation. But Lord Kenyon adverting to this case in the case of the King v. Eriswell (2), said, he admitted that a presentation might be by parol, and might be proved by parol, that is, by a witness who was present and heard it; but he denied, that in such a case common reputation could be given in evidence. If it can, he added, why might not such evidence decide titles to estates, at least before the statute of frauds, when no written instrument was required to make a good feoffment of the greatest landed property in the kingdom.

The declarations of deceased persons have also been admitted, in cases where they appear to be made against their interest; as, entries in their books, charging themselves with the receipt of money on the account of a *Declarations against interest.*

(1) Bull. N. P. 295, and cited by Buller J. in K. v. Eriswell, 3 T.R. 719. S.C. reported 1 Wils. 215.

(2) 3 T.R. 723.

third

third person (1), or acknowledging the payment of money due to themselves (2). In either case, the entry is to their own immediate prejudice, and strong evidence of the fact, in consideration of which the money is said to have been received or paid. Thus, where the point in issue was, whether a certain waste was the soil of the defendant, entries by a steward, since deceased, of money received by him from different persons in satisfaction of trespasses committed on the waste, are evidence to shew that the right to the soil was in his master, under whom the plaintiff claimed (3). So rentals in which a deceased bailiff or receiver charges himself with specified sums, are evidence to shew for what particular tenure, or in what right the money was received (4). So, a bill of lading, signed by the deceased master of a vessel, for goods to be delivered to a consignee, is evidence of property in the consignee, not only against the master, but also, as it seems, in an action of trover for the goods against a third person (5). So, a written memorandum by a deceased man-midwife, stating that he had delivered a woman of a child on a certain day, and referring to his ledger, in which a charge for his attendance was marked as paid, was thought by the Court of King's Bench to have been properly received in evidence, upon an issue as to the child's age (6). This entry was made by a person, who, so far from having an interest to make them, had an interest the other way. For, it appeared distinctly, from other evidence, that the work charged was actually done; and the discharge in the book repels the claim, which he would otherwise have had.

(1) Barry v. Bebbington, 4 T. R. 515. Harpur v. Brooke, 3 Woodeson, Lect. 332. Stead v. Heaton, 4 T. R. 669.

(2) Warren v. Greenville, 2 Str. 1129, commented on by Lord Mansfield in Brydges v. Duchess of Chandos, 2 Burr. 1072, and by Ld. Ellenborough in Higham v. Ridgway, 10 East, 118. Doe dem. Reece and others v. Robson and another, 15 East, 33.

(3) Barry v. Bebbington, 4 T. R. 515.

(4) Harpur v. Brooke, 3 Woodeson's Lect. 332. Vin. Ab. "Evidence," (A. b. 35.) 13.

(5) Haddow v. Parry, 3 Taunt. 305.

(6) Higham v. Ridgway, 10 East, 109, 110.

Upon

Upon the same principle, in a late case, in an action of ejectment by the first tenant in tail under a settlement (by which an estate was limited to A for life, remainder to B for life, remainder to C his eldest son for life, remainder to C's eldest son in tail, &c., with a power to the tenants for life to grant leases on condition of reserving the ancient rent) against the defendant who claimed as lessee of C, to recover a part of the estate, which, as the lessor of the plaintiff complained, had been demised for less than the ancient rent, the Court of King's Bench held, that a letter, addressed to B, by one intimately acquainted with the property, purporting to be a particular account of the ancient rents at that time, and recognized as such by B, and preserved by the successive owners of the estate, ought to have been received at the trial, as evidence of the ancient reserved rent against C, (a succeeding tenant for life, subject to the restrictions of the same power,) and also against the defendant claiming under C. This old paper, so accredited and adopted, was considered to be equivalent to a declaration by B himself. Lord Ellenborough, in delivering the judgment of the Court, said, "The contents of the paper were adverse to the title of the person who had possession of it, by diminishing the interest in the fine on renewal, in the same proportion as it raised the rent to be reserved. Then at such a distance of time, with the means of knowledge which he had of the fact, and his interest in declaring it the other way, we think that his declaration is evidence of the fact to go to the jury." (1)

So, where the question was, whether some horses, which had been taken by the defendant under a heriot custom, belonged to the plaintiff or to one A. B, a deceased tenant of the defendant, declarations by A. B were offered

(1) Roe d. Brune v. Rawlings, 7 East, 279, 290. See also the following cases, in which declarations of deceased persons, against their interest, were received in evidence; Baggalley v. Jones, 1 Campb. 367; Morewood v. Wood, 14 East, 328; Doe d. Reece v. Robson, 15 East, 33; Price v. Littlewood, 3 Campb. 288. Searle v. Ld. Barrington, *suprà*, p. 115. And as to declarations by persons *jointly interested*, see *suprà*, p. 72.

in evidence, for the purpose of proving that the horses belonged to the plaintiff before A. B's death, in which declarations A. B stated that he had given up his farm and all his stock to the plaintiff. This evidence was rejected at the trial; but the Court of Common Pleas, on a motion for a new trial, held that the declarations ought to have been admitted, since they were against the interest of the person who made them, and might have been given in evidence against him in his life-time, if the plaintiff had brought an action for the horses. (1)

Upon the same principle, a paper signed by many deceased copyholders of a manor, importing what was the general right of common in each copyholder, and agreeing to restrict it, is evidence of reputation even against other copyholders not claiming under those who signed it (2). So, a declaration by the owner or occupier of adjoining land, that his neighbour's land extends to such a spot, accompanying an act of forbearance to go beyond the spot for that reason, (or without such act, if he speaks against his interest,) is evidence that the land extends so far (3). So, the declaration of a deceased occupier of land, that he rented it under a certain person, is evidence of that person's seisin (4). Such admissions or declarations against interest appear to be evidence upon the same principle, as the acts of a party against his interest; they differ in degree and in their effect, rather than in their nature. An act of forbearance on one side is an admission of right on the other; and proof of the exercise of a right, which has been acquiesced in, is still stronger evidence that the right exists. It is the constant practice to receive such evidence on questions concerning tolls, rights of way, freehold in wastes, and other cases of the same kind. (5)

(1) Ivat v. Finch, 1 Taunt. Rep. 141.
(2) Chapman v. Cowlan, 13 East, 10.
(3) Sir T. Stanley v. White, 14 East, 332, 339, 341.
(4) Uncle v. Watson, 4 Taunt. 16. see *suprà*, p. 182. Doe dem. Baggalley v. Jones, 1 Campb. 367.
(5) 1 Str. 659. 14 East, 342, 1 Campb. 310.

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The memorandum or entry, before it can be received in evidence, must be proved to be authentic; as, by shewing it to be the hand-writing of the deceased person, who knew the fact there stated, or that it was signed by him (1): or, (if signed by another,) that it was made by his order, or afterwards acknowledged by him. And as to the question, whether a book produced was a receiver's book, that may be determined by internal evidence, on an inspection by the Court. (2)

In all the cases which have been mentioned on this subject, the person, who had made the entry or declaration in question, was deceased at the time of the trial: if the rule were not confined to such cases, there would be great danger of collusion. It has, therefore, been held, that such evidence is not admissible where the person is incapable of attending from illness. (3)

Tradesman's book

Entries in the books of a tradesman by his deceased shopman, who therein supplies proof of a charge against himself, have been admitted on the same principle to be evidence of the delivery of goods, or of other matter there stated within his own knowledge. Thus, in an action of assumpsit, the usual course of the plaintiff's dealings appeared to be, that the draymen of the plaintiff, who was a brewer, should come every night to the clerk of the brewhouse, and give him an account of the beer delivered out by them, which he set down in a book kept for the purpose, and the draymen signed it; the drayman, who signed the particular entry offered in evidence, had since died, but his hand-writing was proved; and this entry was held to be good evidence of the delivery of the beer, for which the action was brought (4). This declaration of the

(1) 4 T. R. 515, 516. Jones v. Waller, 3 Gwill. 847. Yate v. Leigh, 3 Gwill. 861.

(2) Doe d. Webber v. Lord G. Thynne, 10 East, 206. 4 T. R. 516.

(3) Harrison v. Blades, 3 Campb. 457.

(4) Price v. Ld. Torrington, 1 Salk. 285; 2 Ld. Ray. 873, S. C. And see Pitman v. Madox, 2 Salk. 690; Calvert v. Archbishop of Canterbury, 2 Esp. N. P. C. 645; Philipson v. Chase, 2 Campb. 110; Hagedorn v. Reid, 3 Campb. 379.

tradesman's servant, of having delivered the goods, is also an admission, that he received them for that purpose, and would have been evidence against him, in an action for not delivering them according to his instructions. But it is clearly distinguishable from entries in the book of a receiver, who by making a gratuitous charge against himself, knowingly against his own interest, and without any equivalent, repels every supposition of fraud. A disposition to commit fraud would have tempted him to suppress altogether the fact of his having received any thing, or to misrepresent the amount of the sum, but not to mis-state the ground or consideration for which it was received; that is, not to mis-state the only fact sought to be established by the proposed evidence. On the other hand, the declaration of the tradesman's servant is offered in evidence to prove the fact of delivery, and as he gives the account not against his own interest, (which is some security for the truth of the statement in the other case,) the probability of his account being true or false is neither greater nor less than the probability of his being honest or dishonest, which is nothing more than may be said in every case of hearsay. The circumstance of his thereby acknowledging the receipt of goods, which, it may be said, would be evidence in an action against him, seems to amount to little or nothing. It was the least he could say: to have said nothing at all, would, as he must have known, necessarily lead to some inquiry. These considerations may serve to shew how cautiously such declarations by shopmen are to be admitted in evidence, to charge third persons with the receipt of goods; more particularly, as the tradesman may easily be furnished with evidence of delivery, by taking a memorandum from the purchaser, or by requiring some other security.

In the case of Evans and Lake (1), a merchant's books were received in evidence under particular circumstances. The question there was, whether certain goods, which had been bought in the name of Mr. Lake, were purchased on

(1) Bull. N. P. 282, 283; and see Cooper v. Marsden, 1 Esp. N. P. C. 1.

his own account, or in trust for Sir Stephen Evans. To prove the latter of these positions, the assignees of Sir Stephen Evans, who were the plaintiffs, first shewed, that there was no entry in the books of Mr. Lake relating to this transaction; they then produced several receipts in the possession of Sir S. Evans for the payment of part of the goods, and on the back of the receipts there was a reference in the hand-writing of Sir Stephen's book-keeper, since deceased, to a certain shop-book of Sir Stephen. Upon this, the question was, whether the book so referred to, in which was an entry for the payment of money for the whole of the goods, should be read. And the Court of King's Bench on a trial at bar admitted the entry, not only as to the part mentioned in the receipts, but also as to the remainder of the goods then in the hands of Mr. Lake's son. In this case, (which Ld. Hardwicke (1) has observed upon, as "new and having gone a great way,") the entry was not offered by the assignees, as evidence of payment against the seller of the goods, but as corroborating evidence to shew, that while the books of the other party concerned took no notice whatever of the goods, those of Sir S. Evans, under whom the plaintiffs claimed, treated the goods as bought on his account.

In another case, where the plaintiff, to prove delivery of wine to the defendant, produced a book belonging to his cooper since dead, whose name was subscribed to several articles, which it was proposed to read after proof of the hand-writing, Lord Raymond C. J. would not allow it, saying it differed from Lord Torrington's case (2) *.

(1) In Glyn v. Bk of England, 2 Ves. 43.

(2) Clerk v. Bedford, Bull. N. P. 382.

* See the case of Cooper v. Marsden, 1 Esp. N. P. C. 1., where, in order to prove payment of a draft at a banker's, the banking-house book was offered in evidence, in which book there was an entry of the payment of the draft in question. Lord Kenyon ruled, that the entry could only be proved by the clerk who made it, if living; and that other proof was not admissible, though he might be abroad. According to the report of this case, no objection seems to have been taken against the admissibility of the entry itself, on the ground of its being found in a third person's book; nor does that point appear to have been noticed.

And Lord Kenyon ruled, in the case of Calvert v. Archbishop of Canterbury (1), that, in an action for the hire of a pair of horses, an entry by the plaintiff's servant, since dead, stating the terms of the agreement with the defendant, ought not to be admitted.

In an action by a tavern-keeper (2), it appeared, that the defendant belonged to a club, which was held at the plaintiff's house, and that in a room, where the club met, a book used regularly to be kept open, in which the plaintiff's servants entered the articles, as they were ordered by the members of the club, who had thereby an opportunity of inspecting and correcting the account. Lord Kenyon admitted the book as evidence of the delivery, though it was not proved that the servants, who made the entry, were dead, nor was their absence accounted for, and only their hand-writing was proved. The daily account in the book was in this case considered as tantamount to a bill delivered and admitted by the defendant.

The ſtat. 7 J. 1. c. 12. enacts, that the shop-book of a tradesman shall not be evidence in any action for wares delivered or work done, above one year before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt or obligation of the debtor for the said debt, or shall have brought against him some action, within a year next after the delivery of the wares, or the work done. And the 2d section provides, that nothing in the act shall extend to the mutual trading and merchandize between tradesman and tradesman. At the time of making this act of parliament, there was an opinion growing up, that, after a certain length of time, a man's shop-books should be evidence for him, after the year: to prevent which, the act was made (3). However the book is not evidence, even within the year, except under particular

(1) 2 Esp. N. P. C. 646.
(2) Wiltzie v. Adamson, K. B. Sitt. after Mich. term 1789, MS.
(3) Per Ld. Hardwicke, 2 Ves. 43.

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circumstances. An entry made by a tradesman himself, stating the delivery of goods, is not evidence for him; but, whether made by him or not, it may often serve as a memorandum to refresh the memory of the shopman, and for that purpose is admissible.

It has been already stated, that admissions by one of the parties to a suit, against his interest, are evidence against him; and that statements made by a third person, on being referred to by a party respecting any litigated point (1), or representations by a party's agent (2), are in many cases admissible against the principal. To such cases the objection of hearsay does not apply. Nor does the objection apply to the account which has been given by a witness on a former trial, or to dying declarations.

Testimony on former trial.

If a witness, who has been examined in a former action between the same parties, and where the point in issue was the same as in the second action, is since dead, what he swore at the trial, may be proved by one who heard him give evidence (3). For such evidence was not given in an extrajudicial manner, but upon oath. The parties to the suit were the same, the point in issue was the same, and an opportunity was given for cross-examination. These circumstances plainly distinguish the proposed evidence from hearsay. So, where a person, who had been sworn on a former trial between the same parties on the same issue, and subpœna'd to appear as witness at a second trial, did not appear in obedience to the writ, the Court of King's Bench, seeing reason to believe that he had been kept away by the contrivance of the adverse party, admitted other witnesses to prove what he had sworn on the former occasion (4). The person called to prove what a deceased wit-

(1) See ante, p. 77.

(2) See ante, p. 74.

(3) Per Cur. in R. v. Carpenter, 2 Show. 47. Buckworth's case, Sir T. Raym. 170. Vin. Ab. "Evidence," (T. b. 88.), pl. 4. Coker v. Farewell, 2 P. Will. 563. Pike v. Crouch, 1 Ld. Ray. 730. Per Lord Kenyon, 4 T. R. 290. Mayor of Doncaster v. Day, 3 Taunt. 262.

(4) Green v. Gaturck, Bull. N. P. 243.

ness said, must undertake to repeat precisely his very words, and not merely to swear to their effect (1). Thus, in a case before Lord Kenyon, a witness was not allowed to speak to the effect of what the deceased witness had sworn on the former trial. "He ought," said Lord Kenyon, "to recollect the very words; for the jury alone can judge of the effect of words (2)." And he cited the case of the King v. Deborah from one of his own notes, to the same point. For the purpose of introducing an account of what a deceased witness swore on the first trial, the nisi prius record and the postea indorsed are good evidence to shew, that a cause was brought on for trial, or that it was actually tried. (3)

Dying declarations.

The dying declarations of a person, who has received a mortal injury, are constantly admitted in criminal prosecutions, and are not liable to the common objection against hearsay evidence (4). The principle of this exception to the general rule is founded partly on the awful situation of the dying person, which is considered to be as powerful over his conscience as the obligation of an oath, and partly on a supposed absence of interest on the verge of the next world, which dispenses with the necessity of cross-examination. But before such declarations can be admitted in evidence against a prisoner, it must be satisfactorily proved, that the deceased, at the time of making them, was conscious of his danger, and had given up all hope of recovery. This consciousness of approaching death may be collected either from the circumstances of the case, (as, from the nature of the wound and the state of body), or from expressions used by the deceased (5). And it has been decided by all the judges, that the question, whether the deceased made the declarations under the apprehension of

(1) Ld. Palmerstone's case, cited by Lord Kenyon in R. v. Joliffe, 4 T.R. 290.

(2) Ennis v. Donisthorn, Cornw. Sum. Ass. 1789, MS.

(3) Pitton v. Walter, 1 Str. 162.

(4) R. v. Reason and Tranter, 1 Str. 499. Woodcock's case, 2 Leach. Cr. C. 566. Bambridge's case, 9 St. Tr. 161.

(5) Woodcock's case, 2 Leach, Cr. C. 566. Dingler's case, ib. 638. John's case, 1 East, Pl. Cr. 357.

death,

death, is a question for the judge to determine, not for the jury. (1)

On the same principle, the dying declarations of an accomplice are admissible; for the accomplice himself would have been a competent witness, if he had been living. This was determined by all the judges in Margaret Tinkler's case (2). The greater part of the judges were of opinion in this case, that the declarations of the deceased were alone sufficient evidence to convict the prisoner; on the ground, that they were not to be considered as evidence coming from a particeps criminis, as she thought herself dying at the time, and had no view or interest to serve in excusing herself, or fixing the charge unjustly on others. But others of the judges held, that her declarations were to be so considered, and therefore required the aid of confirmatory evidence. The declarations of a criminal at the time of his execution cannot be received on the trial of an accomplice; for, after attainder, he could not be sworn as a witness. (3)

The same kind of evidence is admissible in civil cases, as well as in trials for murder. Thus, the declaration of a person, who, having set his name as subscribing witness to a bond, in his dying moments begged pardon of Heaven for having been concerned in forging the bond, was admitted to be evidence of the forgery by Mr. Justice Heath (4), on the authority of Wright on the demise of Clymer v. Littler (5), where similar evidence of a dying confession by a subscribing witness to a will had been received by Chief Justice Willes, and afterwards approved by the Court of King's Bench. Lord Mansfield on that occasion said,

(1) By the opinion of all the Judges, in John's case, 1 East, Pl. Cr. 357., and in Welborn's case, 1 East, Pl. Cr. 359. In Woodcock's case, which was before the two last, this question had been left to the jury by Eyre C.B., 1 East, Pl. Cr. 360.

(2) 1 East, Pl. Cr. 354, 6.

(3) Drummond's case, 1 Leach, Cr. C. 378; 1 East, Pl. Cr. 353, S. C.

(4) Cited by Ld. Ellenborough in Aveson v. Lord Kinnaird, 6 East, 195.

(5) 3 Burr. 1244. 1255.

"The

"The account was a confession of great iniquity, and as the dying person could be under no temptation to say it, but to do justice and ease his conscience, I am of opinion the evidence was proper to be left to the jury."

As the declarations of a dying man are admitted, on a supposition, that, in his awful situation on the confines of a future world, he had no motives to misrepresent, but on the contrary the strongest motives to speak without disguise and without malice, it seems to follow, that the party, against whom they are produced in evidence, may enter into the particulars of his behaviour in his last moments, or may be allowed to shew that the deceased was not of such a character, as was likely to be impressed by a religious sense of his approaching dissolution.

Hearsay part of *res gesta.*

Hearsay is often admitted in evidence, as part of the *res gesta;* the meaning of which seems to be, that where it is necessary, in the course of a cause, to inquire into the nature of a particular act and the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence, for the purpose of shewing its true character. Thus, for example, in an action by the assignees of a bankrupt, the bankrupt's declarations at the time of his absenting himself from home are properly received in evidence, to shew the motive of his absence. In the case of Bateman v. Bailey (1), therefore, where the question was, whether the trader's departure from his dwelling-house amounted to an act of bankruptcy, the Court of King's Bench were of opinion, that the reasons, which he gave for his absence, after his return home, ought to have been admitted in explanation of his own act. The words of the stat. 1 J. 1. c. 15. s. 2. are, that every person using the trade of merchandize, &c., who shall begin to keep his house, or otherwise absent himself, or *depart his*

(1) 5 T. R. 512. And see Maylin v. Eyloe, 2 Str. 809. Ewens v. Gold, Bull. N. P. 40.

dwelling-

dwelling-house, to the intent or whereby his creditors shall or may be defeated or delayed for the recovery of their past debts, &c., shall be accounted and adjudged a bankrupt.

In the case of Thompson and wife against Trevanion (1), which was an action of trespass and assault, Lord C. J. Holt allowed what the wife said, immediately upon the hurt received, and before she had time to devise or contrive any thing for her own advantage, to be given in evidence. So, on an indictment for a rape, what the girl said recently after the fact, (so that it excluded a possibility of practising on her,) has been held to be admissible in evidence, as a part of the transaction (2). So in the case of Aveson v. Lord Kinnaird (3), where, (in order to ascertain whether the deceased was in a good state of health on the day of the insurance, it became material to consider what the state of health was both before and after that day,) the account, which the deceased gave some days after obtaining the certificate of good health, respecting her state on the former day, was admitted at the trial, and the Court of King's Bench were of opinion, that it had been properly admitted. And it is in every day's experience, said Mr. Justice Lawrence in this case, that what a man has said of himself to his surgeon is evidence, in an action of assault, to shew what he has suffered by reason of the assault. So, it should seem, in an action for criminal conversation, the declarations of a wife at the time of her elopement, stating the reason of her eloping, (as, that she fled from an immediate fear of personal violence,) would be evidence against the husband (4); but a collateral declaration, respecting a matter which happened at another time, would not be admissible. And where, in an action for criminal conversation, the defence was, that the plaintiff had connived at his wife's elopement, evidence was received, on the part of the

(1) Skin. 402, cited by the Court, 6 East, 193.

(2) Brazier's case, 1 East, Pl. Cr. 444.

(3) 6 East, 188, 198; ante, p. 181.

(4) 6 East, 193.

plaintiff,

plaintiff, of the wife's declarations as to her intention and purpose in going (1); for the question, in effect, was, whether the husband knew, that she was about to elope, or whether he believed, that her intention was as she represented.

(1) Hoare v. Allen, 3 Esp. N. P. C. 276, before Lord Kenyon, on 2d trial, who said, that some of the Judges, on the motion for a new trial, were of opinion, that this evidence ought to be admitted.

CHAP. VIII.

On the Examination of Witnesses.

AFTER considering, in the last chapter, what kind of evidence ought to be produced for ascertaining the points in issue, the next subject of inquiry relates to the manner, in which witnesses are to be examined.

The ordinary mode of proceeding in the courts of common law, preparatory to the examination of a witness, is to swear him in chief, unless an objection should be made to his competency; in which case, the practice formerly was to examine him on the voire dire, and this was so strictly observed, that, if a witness were once examined in chief, he could not afterwards be objected to on the ground of interest. But, in later times, the rule has been to a certain extent relaxed, and now, if it should be discovered in any stage of the trial, that a witness is interested, his evidence will be rejected. This is as well for the convenience of the Court, as for the purposes of justice. The examination of a witness, to discover whether he has any interest in the cause, is frequently to the same effect as his examination in chief; it therefore saves time and is more convenient, that the witness should be sworn in chief in the first instance; and if it should afterwards appear that he is interested, it will

will then be time to take the objection (1). This relaxation, however, of the ancient rule, does not extend so far, as to allow the counsel on the cross-examination to ask the witness every sort of question, which might be proper on the voire dire. For example, after an examination in chief, a witness is not to be cross-examined as to the contents of a will not produced in court, under which it is suggested that he takes some interest, although such questions might be properly asked in an examination on the voire dire. (2)

When the witness has been regularly sworn, he is first examined by the party which produces him; after which, the other party is at liberty to cross-examine. The examination is in open court, in the presence of the parties, their attornies and counsel, and before the judge and jury, who have thus an opportunity of observing the understanding, demeanor, and inclination of the witnesses.

Leading questions, that is, such as instruct a witness how to answer on material points, are not allowed on the examination in chief; for, to direct witnesses in their evidence would only serve to strengthen that bias, which they are generally too much disposed to feel, in favour of the party that calls them. But, if a witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the Court will in its discretion allow the examination in chief to assume the form of a cross-examination. And, in examining a witness for the purpose of directly contradicting another witness, on the opposite side, as to some particular parts of his evidence, which no general examination in chief would be able to touch, leading questions may be properly asked. Thus, for example, after exhausting the witness's memory as to the contents of a written instrument, he may be asked whether it contained a parti-

(1) Turner v. Pearte, 1 T. R. 717. Perigal v. Nicholson, 1 Wightw. 64.

(2) Howell v. Lock, 2 Campb. 14.

cular passage, which has been sworn to on the other side; otherwise it would be scarcely possible ever to come to a direct contradiction. (1)

A witness cannot be compelled to answer any question, which has a tendency to expose him to penalties, or to a criminal charge (2). Thus, on an indictment for a rape, the woman is not obliged to answer, whether on some former occasion she had not a criminal connection with other men or with particular individuals (3); nor is evidence of such criminal intercourse admissible (4). So, on an appeal against an order of bastardy, a person cannot be compelled to acknowledge himself the father of a bastard child; but there is no objection to his being sworn, and, if he chooses, he may confess the fact (5). So, it has been held, in an action for a libel (6), (which was published by the defendant in a voluntary affidavit sworn extrajudicially before a magistrate,) that the magistrate's clerk is not bound to answer, whether he wrote the affidavit and delivered it to the magistrate, because the bare copying out of a libel is criminal.

Further, there are some authorities in support of the position, that a witness is not compellable to declare his own infamy, nor to confess what has a direct tendency to degrade his character (7). In Cooke's case, reported in the State Trials, where a question arose, whether a juryman, who had been challenged, might be examined as to his having asserted the guilt of the prisoner before the trial, C. J. Treby

(1) Courteen v. Touse, 1 Campb. 43.

(2) R. v. Ld. G. Gordon, 2 Doug. 593. Title v. Grevet, 2 Ld. Raym. 1088. 16 Ves. jun. 242. Preamb. St. 46 G. 3. c. 37.

(3) Hodgson's case, by a majority of the Judges on a case reserved, 1812, MS. Dodd v. Norris, 3 Campb. 519.

(4) By the opinion of all the Judges in Hodgson's case, MS.

(5) R. v. St. Mary's, Nottingham, 13 East, 58. n.

(6) Maloney v. Bartley, before Wood B. 3 Campb. 210. A bill of exceptions was tendered, but afterwards dropped.

(7) Vid. dictum by Treby C. J. in Cooke's case, 4 St. Tr. 748, and by Pratt C. J. Sayer's case, 6 St. Tr. 259. R. v. Lewis, 4 Esp. N. P. C. 225. Macbride v. Macbride, do. 242.—In R. v. Edwards, 4 T. R. 440, on an application to bail the prisoner, the Court allowed the counsel to ask one of the bail, whether he had stood in the pillory for perjury.

said,

said, "You may ask upon the voire dire, whether he has any interest in the cause, nor shall we deny you liberty to ask, whether he is qualified according to law by having a freehold of sufficient value: but that you may ask a juror (1) *or witness* every question that will not make him criminous, that is too large. *Men have been asked whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer;* for although their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy, and, *if it be an infamous thing, that is enough to preserve a man from being bound to answer.* A pardoned man is not guilty: his crime is purged. But merely for the reproach of it, *it shall not be put upon him to answer a question, whereon he will be forced to forswear or disgrace himself.* So, *persons have been excused from answering, whether they have been committed to bridewell,* as pilferers or vagrants, &c.; yet to be suspected is only a misfortune and shame, no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable." (2)

In Layer's case (3), on an indictment for high treason, the prisoner insisted that a witness should be examined on the *voire dire*, whether he had a promise of pardon, or some other reward, for swearing against him; the point was argued by his counsel, and over-ruled by the Court. The Lord Ch. J. Pratt said, "You see, the most you can make of it, is, that it is an objection to his credit; and if it goes to his credit, must he not be sworn, and his credit left to the jury? He must be examined as a legal witness. But *if this man, under expectation or promise of a pardon, comes here to swear that which is not true, and you would ask him to that, he is not obliged to answer it. No body is to discredit himself,* but always to be taken to be innocent, till it appear

(1) See also Co. Lit. 158. b.
(2) Cooke's case, 4 St. Tr. 748.
(3) 6 St. Tr. 259.

other-

otherwise. If *they, who ask the question, insinuate any thing like that,* (namely, that the witness can give no evidence except what is false,) *it ought not to have an answer:* but if he has a promise of pardon, if he gives true evidence, it is no objection to his being a witness, or to his credit." And Mr. Justice Fortescue Aland, referring to a case cited, where a similar point was made and over-ruled, said, "The reason the Court gave, (that it was improper to ask this question in the *voire dire,)* was, that if he had this promise, such promise was made either to speak the truth, or to speak a falsehood; *if it were to give just and true evidence, there was no harm in it; and if it was a promise of pardon for speaking what was not true, the witness was not bound to answer that question.*" It has been before mentioned, that, if a witness is asked, whether he has been convicted of an offence, and admits the fact, yet the mere admission will not make him incompetent; notwithstanding that he might be incompetent, if the conviction were legally proved by an examined copy of the record. (1)

It has been doubted whether a witness could be compelled to give any evidence which might subject him to a civil action or charge him with a debt. But now, "It is declared by stat. 46 G. 3. c. 37. that a witness cannot by law refuse to answer a question relevant to the matter in issue, (the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever,) on the ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit." But the right, which the *parties to a suit* have, to refuse answering any question, is not in any degree affected by this statute; and therefore, on a question of settlement, a rated parishioner is not compellable by the adverse parish to give evidence, as he is directly interested as party to the

(1) See R. v. Teale, R. v. Careinion, suprà, p. 24.

appeal,

appeal, and does not come within the words or meaning of the act. (1)

A witness can depose only to such facts as are within his own recollection. But to assist his memory he may use a written entry, or memorandum, or the copy of a memorandum; and, if afterwards he can positively swear to the truth of the fact there stated, such evidence will be sufficient. But, if he cannot from recollection speak to the fact any further, than as finding it stated in a written entry, his testimony will amount to nothing (2). When a witness has recourse to a written memorandum for the purpose of assisting his recollection, there seems to be no good reason for confining him to such writings only as were drawn up at the precise time when the facts occurred; for one person may have as clear and strong a recollection, from looking at a paper written half a year after the fact, as another who wrote down the fact on the very day it happened. However, the entry ought to have been made by the witness himself, or, if made by another, examined by him, while the fact was fresh in his memory. (3)

In general, the opinion of a witness is not evidence: he must speak to facts. But on questions of science or trade, or others of the same kind, persons of skill may speak not only as to facts, but are allowed also to give their opinions in evidence. Evidence of character is founded on opinion, and the opinion of a medical man is evidence as to the state of a patient. So, ship-builders have been admitted to state their opinion on the sea-worthiness of a ship, from a survey, which had been taken by others, and at which they were not present (4). So, in an action of trespass for making an embankment, which was said to have gra-

(1) R. v. Inhabitants of Woburn, 10 East, 395.

(2) Sandwell v. Sandwell, per Holt C. J. Comberb. 445. Doe v. Perkins, 3 T. R. 752. Tanner v. Taylor, ib. 754. 8 East, 284. 289.

(3) Burrough v. Martin, 2 Campb. 112.

(4) Thornton v. Royal Exch. Ass. Company, Peake, N. P. C. 25. Chaurand v. Angerstein, ib. 43.

dually choaked up Wells harbour, an engineer was permitted to prove from his own experiments, what were the effects of natural causes upon that particular harbour, and on other harbours similarly situated on the same coast, and that the removal of the bank would not, in his opinion, restore the harbour (1). So, where the question is, whether a seal has been forged, seal engravers may be called to shew a difference between a genuine impression and that supposed to be false. (2)

In cross-examinations, the object of which is to sift evidence, and try the credibility of the witnesses, a great latitude is allowed in the mode of putting questions. The rule, however, is still subject to certain limitations. A witness cannot be cross-examined as to any fact, which (if admitted) would be collateral, and wholly irrelevant to the matter in issue, for the purpose of contradicting him by other evidence, (in case he should deny the fact,) and in this manner to discredit his testimony (3); and if the witness answers such an irrelevant question before it is disallowed or withdrawn, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter (4). In the application of this rule, the principal thing to be considered will be, whether the question is *irrelevant* to the points in issue between the parties. In an action for usury, it would be entirely immaterial and irrelevant to cross-examine the witness respecting *other* contracts supposed to have been made by the defendant, unless the witness had first said that the contracts were the same; and that was the point in the case of Spenceley v. De Willot. So it would be irrelevant to ask a witness in cross-examination, whether he had not attempted to dissuade another witness from attending the trial (5). But it is not irrelevant on the trial of a prisoner, to cross-exa-

(1) Folkes v. Chad, 1783, MS. cited by Buller J. in Goodtitle v. Braham, 4 T. R. 498.

(2) Per Ld. Mansfield in Folkes v. Chad, ib.

(3) Spenceley v. De Willot, 7 East, 108.

(4) Harris v. Tippet, 2 Campb. 638.

(5) Harris v. Tippet, 2 Campb. 637.

mine

mine the witness to this point, whether, in consequence of being charged with robbing the prisoner, he had not said that he would be *revenged* upon him, &c.; and if the witness should deny having used such a threat, evidence may be given to contradict him. (1)

When a witness has been once sworn to give evidence, the other party may cross-examine him, though he gave no evidence for the party that called him (2). And it is reported to have been ruled at nisi prius, that, if a witness has been once examined by a party, the privilege of cross-examination continues in every stage of the cause; so, that the other party may call the same witness to prove his case, and in examining him may ask leading questions (3). In the case referred to, the witness might possibly have shewn a strong bias in favour of the first party that called him, and on this account perhaps a greater scope was granted to the adverse party than is usually allowed. It may happen, on the other hand, that the plaintiff calls a witness, unwillingly and from mere necessity, knowing him to be favourable to the other side: in such a case, to allow the defendant, on calling him up afterwards as his own witness, to put leading questions, would be giving him an unreasonable advantage; on the contrary, the Court might perhaps be induced to invest the plaintiff's counsel with some of the powers of cross-examination, at the same time that it would probably oblige the defendant's counsel to treat such a witness strictly as his own, and confine him within the limits of an examination in chief. If one party calls for the other party's books, but, when they are produced, declines using them, the mere calling for them will not make them evidence for the adverse party (4). It may, said Lord Kenyon, be matter of observation to the counsel on the other side, that the entries in the books

(1) Yewin's case, 2 Campb. 638. n. before Lawrence J.

(2) Philips v Eamer, 1 Esp. N P. C. 357.

(3) Dickinson v. Shee, 4 Esp. N. P. C. 67.

(4) Sayer v. Kitchen, 1 Esp. N. P, C. 210.

were in favour of his client, but cannot entitle him to offer the books in evidence to the jury. If, however, the party who has called for the books, inspects them, he thereby makes them evidence for the other party, although he has not used them himself in evidence (1). Where books are refused, it is a suspicious circumstance, and open to much observation, but it will not be *conclusive* against the party.

There are several ways of impeaching the credit of a witness. 1. The party, against whom a witness is called, may disprove the facts stated by him, or may examine other witnesses, as to his general character: but they will not be allowed to speak to particular facts or parts of his conduct (2); for, "though every man is supposed to be capable of supporting the one, it is not likely that he should be prepared to answer the other without notice;" and, even if he should happen to be prepared to defend himself, such evidence would generally afford a very slight and imperfect test of his credibility. The regular mode is, to inquire whether they have the means of knowing the former witness's general character, and whether from such knowledge, they would believe him on his oath (3). In answer to such evidence against character, the other party may cross-examine the witnesses as to their means of knowledge; or may attack their general character, and by fresh evidence support the character of his own witness. 2. The credit of a witness may be impeached, by proof that he has made statements out of court, on the same subject, contrary to what he swears at the trial (4). A letter, therefore, written by him, or a deposition signed by him, may be used as evidence to contradict his testimony; but a conviction before a magistrate, purporting to set out the

(1) Wharam v. Routlege, 5 Esp. N. P. C. 235.

(2) Bull. N. P. 296.

(3) Per Holt C. J. in Rockwood's case, 4 St. Tr. 693. Mawson v. Hartsink, 4 Esp. N. P. C. 102.

(4) De Sailly v. Morgan, 2 Esp. N. P. C. 691.

deposition of a witness, is not evidence for this purpose (1). In answer to such evidence, and for the purpose of corroborating the testimony of the witness, the Ch. B. Gilbert is of opinion that the party, who called him, may shew that he affirmed the same thing before on other occasions, and that he is still consistent with himself. (2)

If an attesting witness to a will or deed impeach its validity on the ground of fraud, and accuse other subscribing witnesses, who are dead, of being accomplices in the fraud, the party claiming under the instrument may give evidence of their general good character. For, if living, they might be produced as witnesses, and their character would then appear in cross-examination; and after their death an opportunity ought to be given, to shew what credit is to be attached to their attestation (3). But in a case, where a witness for the plaintiff asserts one thing, and a witness for the defendant asserts another, and direct fraud is not imputed to either, evidence to general character is not admissible. (4)

A party will not be permitted to produce general evidence, to discredit his own witness. "This," says Mr. J. Buller, "would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him (5)." The meaning of this rule is, that a party cannot prove his own witness to be of such a general bad character, as would make him unworthy of credit. If he knew the infamy of his character, he was practising a fraud upon the court in producing him as a witness. But if a witness unexpectedly give

(1) R. v. Howe, 6 Esp. N. P. C. 125. 1 Campb. 461. S. C.

(2) Gilb. Ev. 135. See Lutterel v. Reynell, 1 Mod. 282, where this confirmatory evidence was offered *in chief*, which would not now be allowed; and it is doubted in Buller's N. P., p. 294, whether it is good evidence in *reply*.

(3) Doe dem. Walker v. Stephenson, 3 Esp. N. P. C. 284, 4 Esp. N. P. C. 50; cited and approved in 1 Campb. 210.

(4) Bp. of Durham v. Beaumont, 1 Campb. 207.

(5) Bull. N. P. 297.

evidence against the party that called him, another witness may be called to prove those facts otherwise; as, where the question was, whether the defendant's servant, who had been employed to sell a horse, had warranted him sound, he swore, on being called by the plaintiff, that he had not given any warranty; and Lord Ellenborough allowed the plaintiff to call another witness to prove, that at the time of the sale he had expressly warranted its soundness. There can be no rule of law, by which the truth on such an occasion is to be shut out, and justice perverted. (1)

(1) Alexander v. Gibson, 2 Campb. 556. Bull. N. P 297.

CHAP. IX.

On Bills of Exceptions, and Demurrers to Evidence.

THE competency of witnesses and the admissibility of evidence are to be decided by the judge who tries the cause, and from his judgment there is an appeal, by a bill of exceptions.

Bill of exceptions.

At common law, a writ of error could not be brought for any error in law, which did not appear on the record; and therefore where the plaintiff or defendant alleged any thing ore tenus, which was over-ruled by the judge, the party aggrieved had no redress (2). To remedy this defect, it was enacted by stat. 13 Ed. 1. s. 31. "if one, impleaded before any of the justices, allege an exception, praying that the justices will allow it, that, if they will not, and if he write the exception and require the justices to put their seals to it, the justices shall do so, and if one will not, another shall."

This statute extends to the plaintiff as well as the defendant (3), and to a trial at bar as well as at nisi prius (4).

(2) 2 Inst. 426.
(3) 2 Inst. 427.
(4) Thurston v. Statford, 3 Salk. 155; Adm. per Cur. in Duchess of Grafton v. Holt, Skin. 354. R. v. Smith, 2 Show. 287, contrà.

But

But it has been doubted, whether it extends to criminal cases. Lord Coke, in his exposition of the statute, states that it extends to all actions, real, personal, and mixed; but of criminal cases he makes no mention. In the case of Sir H. Vane (1), who was tried for high treason, the Court refused to sign a bill of exceptions, "because," they said, "criminal cases were not within the statute, but only actions between party and party." From this authority Mr. Serjt. Hawkins infers only, that a bill of exceptions is not allowable on an indictment for treason or felony (2). "Whether a bill lies not in any criminal case," said Lord Hardwicke, "is a point not settled (3)." It was allowed in the case of the King against Lord Paget and others, on an indictment for a trespass (4), and also on an information in the nature of a quo warranto (5). But Lord Hardwicke, in the case before referred to, after saying "that he had known a bill of exceptions allowed in informations in the Court of Exchequer, which are civil suits for the king's debt," added, "it has never been determined to lie in mere criminal proceedings in other courts (6)." A bill of exceptions cannot be allowed by the justices of the peace at the Quarter Sessions on the hearing of an appeal against an order of removal (7). It can be used only on a writ of error, and therefore where a wit of error will not lie, there cannot be a bill of exceptions. (8)

Demurrer to evidence.

A demurrer to evidence is a proceeding, by which the judges, whose province it is to determine questions of law, are called upon to declare what the law is upon the facts in evidence. And it is analogous to the demurrer upon facts alleged in pleading. (9)

(1) 1 Lev. 68; Kel. 15. S. C.; 1 Sid. 85. S. C.
(2) Pl. Cr. b. 2. c. 46. s. 210.
(3) R. v. Inhabitants of Preston, Rep. temp. Hard. 251.
(4) 1 Leon. 5.
(5) R. v. Higgins and others, 1 Ventr. 366.
(6) Rep. temp. Hard. 251.
(7) See (3).
(8) Bull. N. P. 316.
(9) See the judgment of Eyre C. J. in Gibson and Johnson v. Hunter, 2 H. Bl. 205, 206.

When the admissibility of the evidence has been established, the question, how far it conduces to the proof of the fact, which is to be ascertained, is not for the judge to decide, but for the jury exclusively. And when the jury have ascertained the fact, if a question arises, whether the fact thus ascertained maintains the issue joined between the parties, or, in other words, whether the law arising upon the fact is in favour of one or other of the parties, that question is for the judge to decide (1). Ordinarily, he declares to the jury what the law is upon the fact which they find, and then they compound their verdict of the law and fact. But if the party wishes to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence. (2)

It is reasonable that either party should have such a power of referring to the Court to decide what the inference of law is upon the facts; as the jury may refuse to find a special verdict, in which case the facts would not appear on the record. On the other hand, as it is the peculiar province of the jury, to ascertain the truth of facts and the credibility of witnesses, the party ought not to be allowed, by a demurrer to evidence, or any other means, to refer the trial of such questions to another tribunal. A demurrer must therefore admit the truth of all facts, which the jury might find in favour of the other party, upon the evidence laid before them, whatever the nature of that evidence may be, whether of record, or in writing (3), or by parol (4). According to Alleyn's report of the case of Wright v. Pindar, it was resolved, "that he that demurs upon the evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the Court; and if the matter of fact be uncertainly alleged, or that it be doubtful whether it be true or no, because offered to be

(1) 2 H. Bl. 205.
(2) Ib.
(3) Baker's case, 5 Co. Rep. 104.
(4) Wright v. Pindar, Alleyn, 18.

proved

proved only by presumptions or probabilities, and the other party demurs thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unless he will confess the matter of the fact to be true." And now it is an established rule, that, in a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion, which the proposed evidence conduces to prove. (1)

If, in an information, or any other suit, evidence be given for the king, and the defendant offers to demur upon it, the king's counsel cannot be compelled to join in demurrer, but in such case the Court ought to direct the jury to find the special matter; and, upon that, they shall adjudge the law. (2)

When all matters of fact are admitted, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury; and being entered on record, it will remain for the decision of the judges. (3)

The whole proceeding upon a demurrer to evidence is under the control and direction of the judge at nisi prius, or of the Court on a trial at bar. The Court, said Mr. J. Doddridge in the case of Worsley v. Filisker (4), may deny and hinder a party from demurring, by over-ruling the matter in demurrer, if it seem to them to be clear in law. And in that case the Court did over-rule the demurrer, and left the case to the jury.

(1) Gibson and Johnson v. Hunter, 2 H. Bl. 187.
(2) 5 Co. Rep. 104.
(3) 2 H. Bl. 208.
(4) 2 Roll. Rep. 119. Bull. N. P. 314.

END OF PART I.

PART THE SECOND.

ON WRITTEN EVIDENCE.

THE preceding chapters having treated of the competency of witnesses, and of parol or unwritten evidence, it is now proposed to inquire into the several kinds of written evidence.

Writings are either public or private. Some public writings are of record; others, not of record. And public writings, not of record, may be distinguished into such as are of a judicial character, and such as are of a public nature, but not judicial. In this order it is proposed to treat of the several kinds of written evidence; and to consider, first, in what cases they are admissible; and, secondly, if admitted, how they ought to be proved.

CHAP. I.

Of Acts of Parliament.

Records. RECORDS are the memorials of the legislature, and of the King's courts of justice; and they are considered of such authority, that no evidence is allowed to contradict them (1). Thus, if a verdict, finding several issues, were to be produced in evidence, the opposite party would not be allowed to shew, that no evidence was offered on one of the issues, and that the finding of the jury was indorsed on the postea by mistake (2). So, where the declaration stated that a precept issued, directed to the *mayor* of a borough,

(1) Co. Lit. 117. b. 260. a. Gilb. Ev. 5. Bull N. P. 221.

(2) Reed v. Jackson, 1 East, 355.

and,

and, on producing the precept, it appeared to have been written, thus, "to the *mayor and commonalty*," but the two latter words had been struck through with a pen, the Court refused to admit evidence, that those words had not been obliterated, when the precept was delivered and returned (1). An officer, who has the care and custody of records, may be examined as to their condition, though he cannot be examined as to their matter or contents (2).

A record, then, is conclusive proof, that the decision or udgment of the Court was, as is there stated: and evidence to contradict it, will not be admitted. But it will not be conclusive as to the truth of allegations, which were not material nor traversable (3). Thus, for example, a party will not be estopped from averring, in an action of debt on a bond, that the bond was made at A, though in a former action upon the same bond, he averred it to have been made at B (4). So, in the case of a conviction for felony, &c., where the jury have given a general verdict, the record will not be conclusive, that the offence was committed on the day mentioned in the indictment, for the time is not of the substance of the charge; and, therefore, the party interested to dispute the forfeiture, (which, in the case of real property, relates to the time of the offence,) may falsify the record, and shew that the offence was committed on another day (5). But if the jury find specially the precise day, all parties are concluded. (6)

The first sort of records, to be considered, are acts of parliament; and these, says Ch. B. Gilbert, are the highest and most absolute proof. Acts of parliament relate either to the kingdom at large, when they are called general acts; or only to particular classes of men, or to certain individuals, in which case they are called private acts. Laws which concern the king, or all lords of manors, or all offi-

(1) Dickson v. Fisher, 4 Burr. 2267; 1 Black. 664, S. C.

(2) Leighton v. Leighton, 1 Str. 210.

(3) Co. Lit. 352. b.

(4) Com. Dig. tit. Estoppel, E. 6.

(5) Ives's case, 3 Inst. 230. Gilb. Ev. 230.

(6) Gilb. Ev. 230.

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cers in general, or all spiritual persons, or all traders, &c. are public laws. But such as relate to the nobility only, or to spiritual lords, or to particular officers or particular trades, are private acts (1). This distinction between public and private acts is not applied, in collections of the English statutes at large, to any statutes previous to those of Richard the third. From that period the distinction commences in the several tables prefixed to the respective collections. (2)

The general rule is, that public acts of parliament are to be taken notice of judicially by courts of law, without being formally set forth; but particular or private acts are not regarded by the judges, unless formally shewn and pleaded (3). In some cases, however, the necessity of pleading a private act has been dispensed with; as, where there is a special clause, enabling the defendant, in answer to any action for matters done under the act, to plead the general issue; or, where the private act has been recognized by some public act of the legislature. Thus, the statute 23 H. 6. c. 9., relative to sheriffs' bonds, (even supposing it to be a private act, as relating only to officers of a certain description,) must now be taken notice of judicially, because the statute 4 & 5 Ann. c. 16. s. 20. enables the sheriff to assign the bond. (4)

In many cases a defendant will be precluded, by the nature of the pleadings, from taking advantage of a public act of parliament. Thus, in an action of debt upon a bond, the defendant cannot, under the plea of non est factum, avail himself of the statute 13 Eliz. c. 8. s. 4. (5), which makes usurious contracts utterly void. But if he pleads that the bond was void on account of usury, he may insist upon the statute, though he has not formally recited it (6). In an

(1) Gilb. Ev. 39, 40.
(2) See preface to new edit. of Statutes at large.
(3) Bull. N. P. 222.
(4) Saxby v. Kirkus, Bull. N. P. 224. Samuel v. Evans, 2 T. R. 575.
(5) See also 12 Ann. St. 2. c. 16.
(6) Com. Dig. tit. Pleader, 2 W. 23.

action

action of assumpsit, indeed, where the defendant may give in evidence any thing that discharges the debt, or proves nothing due, he may shew under the general issue, that the contract was usurious (1), or founded on an illegal consideration which makes the contract void. (2)

If an action or information be brought upon a penal statute, and there is another statute which exempts or discharges the defendant from the penalty, this latter act (as some books lay down the rule) cannot be given in evidence under the general issue, but ought to be pleaded; for the general issue is but a denial of the plaintiff's declaration, and the plaintiff, it is said, has proved him guilty, when he has proved him within the law upon which he founds his declaration (3). It is, indeed, enacted by statute 21 Jac. 1. c. 4. s. 4., that, in actions on penal statutes, it shall be lawful for the defendant to plead not guilty, or that he owes nothing, and to give in evidence such special matter, which, if pleaded, would have discharged the defendant at law; but this statute has been generally considered to attach only on antecedent penal laws, and not to extend to those subsequently enacted (4). However, it should seem, according to the modern practice, the defendant may plead *nil debet*, and give in evidence the statute; which would shew, that he does not owe the penalty. And if the same act, which imposes the penalty, contains also the proviso of exemption, it is quite clear that this proviso may be shewn under the general issue. (5)

(1) Ld. Bernard v. Saul, 1 Str. 498. Bull. N. P. 152. S. C.

(2) Adm. per Cur. in Hussey v. Jacob, 1 Ld. Ray. 89.

(3) 2 Roll. Ab. 683. pl. 13. Bull. N. P. 225.

(4) Gaul's case, 1 Salk. 372. Hicks's case, ib. Per Lord Mansfield in 4 Burr. 2467. Bull. N. P. 196. French q. t. v. Coxon, 2 Str. 1081; more fully stated in 2 Selw. N. P. 562. n. (117.)

(5) 4 Burr. 2469. Bull. N. P. 225.

CHAP. II.

On Verdicts, and Judgments of Courts of Record.

IN treating of judicial proceedings, and inquiring in what cases they are admissible in evidence, it is proposed to consider, first, the verdicts and judgments of courts of record; secondly, the judgments of courts of exclusive jurisdiction; and, thirdly, certain other proceedings of an inferior kind.

The admissibility of verdicts and judgments of courts of record is the subject of the present chapter, in which will be considered, first, their admissibility, with reference to the *parties* in the suit; secondly, their admissibility, with reference to the *subject-matter* of the suit; thirdly, the admissibility, in civil cases, of verdicts which have been given in criminal prosecutions.

SECT. I.

Of Verdicts and Judgments, with reference to the Parties in the Suit.

IT is a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person, who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. Hence the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding a fact, or the judgment of the court on facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers (1). To this general rule there are some ex-

(1) Judgment of De Grey C. J. in Duchess of Kingston's case, 11 State Tr. 261.

ceptions,

ceptions, founded upon particular reasons, which will be stated in the course of the present chapter.

But although justice requires that third persons, who had no opportunity of examining witnesses in a suit, or of making a defence, should not be prejudiced by the verdict or judgment, it is on the other hand equally just, that the parties to the suit should be subject to a different rule. "From the variety of cases," said Ch. J. De Grey, in delivering his celebrated judgment in the case of the Duchess of Kingston, "relative to judgments being given in evidence in civil suits, it seems to follow as generally true, that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter directly in question in another court (1)." Here Ch. J. De Grey was about to consider the effect of judgments pronounced in other courts of concurrent jurisdiction: but the same principle and the same rule appear with still greater force to apply to judgments in the *same* court.

Between same parties

First, then, a judgment directly upon the point, is, as a plea, a bar between the same parties. A party may be estopped by a verdict on record: as, in an action of trespass, if the defendant prescribes for common, and the plaintiff traverses the prescription, the defendant may say, that, in a former action by the plaintiff against the defendant, the same prescription was found against the plaintiff. (2)

Upon the same principle, it is presumed, a judgment will be, as evidence, conclusive between the same parties, in those cases where it can be given in evidence without

(1) Judgment of De Grey C J. in Duchess of Kingston's case, 11 State Tr. 261.

(2) Com Dig. tit. Estoppel, (A. 1.) p 73. citing 1 Show. 28. The case is Incledon and another v. Burges The doubt there was, whether this was a good estoppel as against a co-plaintiff, a stranger to the former action; and the Court gave judgment on another point. On this subject, see the judgment in the case of Outram v. Morewood, 3 East, 354, 5.

being

being specially pleaded. The rule has been expressly so declared with reference to the judgments of courts of *concurrent* jurisdiction (1), and it seems to be equally applicable in principle to a former judgment of the *same* court. 1. Thus, in an action of assumpsit, the defendant may either plead a judgment recovered, or give it in evidence under the general issue (2); and it is difficult to assign a reason, why the judgment should not have the same conclusive operation, if given in evidence without pleading, as it would be admitted to have, if pleaded in bar. 2. In an action of trespass for mesne profits, the judgment in ejectment is conclusive against the defendant on the right of possession at the time of the demise laid in the declaration (3). 3. A judgment of the quarter sessions discharging an order of removal, on an appeal, is conclusive evidence between the respondent and appellant parishes, that, at the time of the first order of removal, the settlement of the pauper was not with the appellants. 4. So, a record of conviction, on an indictment against a parish for not repairing a road will be conclusive evidence, on a plea of not guilty to a second indictment, of the liability of that parish to repair (4). "If the parish can shew fraud, it will vitiate this or any other judgment; but, unexplained, it will be conclusive evidence *." 5. So, if the defendant, in an action of trespass, plead his soil and freehold, and give in evidence a verdict on the same plea in a former ac-

(1) See ante, p. 223.

(2) Per Lord Mansfield in Bird v. Randall, 3 Burr. 1353.

(3) Aslin v. Parkin, 2 Burr. 666.

(4) R. v. St. Pancras, Peake N. P. C 219.

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* Fraud, as it has been observed (1), is only put for an example. If the parish consists of several districts, which have immemorially repaired the respective highways lying within them, and if the districts, in which the road indicted is not situate, can shew that they had *no notice* of the former indictment, (the defence having been made and conducted entirely by the district, within which the road lies,) the Court will consider the indictment as being substantially against that district, and give the other districts leave to plead the prescription to a subsequent indictment for not repairing the highways in the parish. R. v. Townsend, 1 Doug. 421.

(1) 2 Saund. 159 a note by the editor.

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tion between the same parties, this probably would be conclusive, that the right to the soil and freehold was at the time as found. If, indeed, the defendant in the former action had pleaded not guilty together with the plea of liberum tenementum, and a *general* verdict had been found, and this should afterwards be given in evidence, (as in the case supposed,) such a general verdict would not be *conclusive* evidence of the right, as if there had been a verdict on the plea of liberum tenementum, though it would be material evidence; and the defendant would be admitted to prove, that on the former occasion no evidence was offered except on the general issue (1). But if this general verdict were *pleaded* by way of estoppel, it would estop the plaintiff. (2)

In the case of Moses v. Macferlan (3), indeed, the Court of King's Bench held, that the plaintiff might recover back money, which he had paid under a judgment obtained against him by the defendant in an action in a court of conscience, which action the defendant brought against him as indorser of a bill of exchange, in breach of a written agreement. They admitted it, however, to be a clear principle, that the merits of a judgment can never be over-ruled by an original suit either at law or in equity; and that the judgment is conclusive, as to the subject-matter, until it is set aside or reversed. The ground of the decision in that case was, that the breach of the agreement was no defence to the action in the court of conscience, being a collateral matter not within their cognizance. But this has been since questioned (4); and it has been thought, that the breach of the agreement went to the essence of the debt demanded, and was necessarily as much a defence in that court, as it would have been in the Court of King's Bench. The case of Moses v. Macferlan,

(1) See 3 East, 364, 5. 6 T. R. 609.
(2) 3 East, 365.
(3) 2 Burr. 1006, 9.
(4) By Eyre C. J. in Philips v. Hunter, 2 H. Bl. 414. And see Marriott v. Hampton, 7 T. R. 269. Brown v. M'Kinnally, 1 Esp. N. P. C. 279.

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therefore, does not in any manner infringe, but rather confirms, the general rule, that the merits of a question, which has been directly determined by a court of competent jurisdiction, cannot be tried over again, between the same parties, in any shape whatsoever.

The authority of a former adjudication of the right prevails between the *same parties*, that is, between the same persons suing or sued in the same quality or character. A woman is not estopped, after coverture, by an admission upon record by her husband and herself, during coverture (1). So an heir, who claims as heir of his father, shall not be estopped by an estoppel upon him as heir to his mother (2). So a party suing as *executor*, in an action of debt upon a bond, will not be estopped by having been barred in an action upon the same bond, when he sued as *administrator*; but he may shew that the letters of administration have been since repealed. (3)

Between *privies*. Estoppels by verdict, admissions on record, &c. bind privies in blood, (as the heir,) privies in estate, (as feoffee, lessee, &c.) and privies in law, (as lord by escheat, tenant by curtesy, tenant in dower, the incumbent of a benefice, and others who come in by act of law in the *post*); in the same manner, persons standing in either of these relations will be bound equally with the parties themselves, by a judgment in a former action, for the same matter, if pleaded in bar. (4)

A verdict or judgment, in a former action, upon the same matter directly in question, is also *evidence* for or against privies in blood, privies in estate, and privies in law, as well as for or against the parties to the suit. Thus, if an ancestor has obtained a verdict, the heir may give it in

(1) Com. Dig. tit. Estoppel, (C).
(2) Ib.
(3) Robinson's case, 5 Rep. 32. b.
(4) Co Lit. 352. a. Com. Dig. tit. Estoppel, (B). Outram v. Morewood, 3 East, 346.

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evidence, as privy to it (1). So, if several estates in remainder be limited in a deed, and one of the parties in remainder obtain a verdict in an action brought against him for the same land, that verdict may be given in evidence, for another person in remainder, in an action brought against him for the same land, although he does not claim any estate under the first remainder-man; because they all claim under the same deed (2). So, a verdict for or against a lessee is evidence for or against the reversioner (3). And a decree in the Court of Exchequer, in a cause between the vicar on one side and the impropriator on the other, (establishing the vicar's title to small tithes under an ancient endowment against the defendant, who insisted that he was only entitled to an annual payment in lieu of tithes,) is evidence in suits between succeeding vicars and patrons; but not conclusive evidence, as it would be, if the ordinary had been a party to the first suit (4). So, a judgment for or against the school-master of a hospital, concerning the rights of his office, has been admitted to be evidence for or against his successor (5). And so, where, on an information in the nature of a quo warranto against the defendant for acting as bailiff of a corporation, the defendant pleaded that he had been duly elected under a nomination by two persons, who were bailiffs of the corporation, and the point in issue was, whether they were bailiffs at the time of the election, the record of a judgment of ouster in a quo warranto against them, was adjudged to be good evidence against the defendant, who claimed under them (6) *. These cases fully establish the rule above laid down,

(1) Per Cur. in Lock v. Norbonne, 3 Mod. Rep. 142.

(2) Pyke v. Crouch, 1 Ld. Ray. 730. Com Dig. tit. Evidence, (A. 5.). Bull. N P. 232.

(3) Per Cur. in Rushworth v. Countess of Pembroke and Currier, Hardr. 472. Com. Dig. ib. Bull. N. P. 232. Gilb. Ev. 35, 6.

(4) Carr v. Heaton, 3 Gwillim, 1261. See Bishop of Lincoln v. Ellis and another, 2 Gwill. 632.

(5) Lord Brounker v. Sir R. Atkins, Skin. 15.

(6) R. v. Hebden, Andr. 388; 2 Str. 1109, S. C.; Bull. N. P. 231, S. C.; 2 Selw. N. P. 1047, cited from MS. R. v. Grimes, 5 Burr. 2601. S. P.

* Judgment of ouster has been considered in the nature of a judgment *in rem.* In the case of the King v. the Mayor of York, 5 T. R. 72, where the cases of R. v. Hebden

down, that a verdict or judgment, directly upon the point, is good evidence, not only for or against the parties to the suit, but also for or against any persons standing in the relation before mentioned, of privies in blood, privies in estate, or privies in law.

Not evidence *against* a *stranger.*

The general rule is, that a verdict cannot be evidence for either party, in an action against one who was a stranger to the former proceeding, who had no opportunity to examine witnesses, or to defend himself, or to appeal against the judgment. Thus a verdict in an action between A and B is not evidence against a third person C, who was neither party nor privy to the first suit. The case of Green v. The New River Company (1), where Lord Kenyon said, that a verdict, obtained in an action against a person for the negligence of his servant, is evidence in a subsequent action by the master against the servant, as to the quantum of damages, is not an exception to the general rule. Such a verdict would not be evidence of the fact of the injury, but admissible only as evidence of special damages, to shew the amount of what the master was by process of law compelled to pay in the action brought against himself.

It is not easy to reconcile with this general rule the case of Kinnersley v. Orpe (2), where a verdict for the plaintiff in an action for a trespass, committed in the plaintiff's fishery, against one who justified as servant, was allowed to be evidence against another defendant, in a subsequent action for a penalty incurred by destroying fish in the same fishery. At the trial of the cause this was admitted, after

(1) 4 T. R. 590. And see 2 East, 459.

(2) 2 Doug. 517. The Court of K. B. thought the evidence *admissible*, but not *conclusive*.

v. Hebden and R. v. Grimes were cited in argument, in order to shew that such a judgment cannot be conclusive against third persons, Lord Kenyon is reported to have said, "If you derive title to a corporate office through A, and the prosecutor shew a judgment of ouster against A, it is *conclusive* against you, unless you can impeach the judgment as obtained by fraud."

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argument to be *conclusive* evidence of the plaintiff's right of fishery; as it appeared, that the defendant in the second suit acted by the command of the same person, under whom the defendant in the first action had justified, and who was considered by the judge to be the true party in both causes. "It is extraordinary," said Lord Ellenborough (1), commenting on this case, "that it should ever have been for a moment supposed, that there could be an estoppel in such a case. It was not pleaded as such; neither were the parties in the second suit the same as those in the first. The doubt seems rather to be, whether the former record in the action of trespass was at all *admissible* in evidence upon the subsequent action, against the defendant, who was not a party to the former action, rather than as to any conclusive effect which it could have had."

Another case, which does not come strictly within the general rule, is where a record of conviction for felony is admissible in evidence against an accessary, to shew that the felony has been committed. "The only questions," says Mr. Justice Foster (2), "in which the accessary can have any concern in common with the principal, are, first, whether the felony was committed, and, secondly, whether it was committed by the principal. These facts the conviction of the principal hath established with certainty, *at least sufficient to put the accessary to his answer.* The rule is founded on a legal presumption, that every thing in the former proceeding was rightly and properly transacted. Another weighty reason is, that the witnesses against the principal may be dead, or not to be found, when the accessary is brought upon his trial, especially after a long interval between the trials." Mr. Justice Foster admits, that the record of conviction is not *conclusive* evidence against the accessary, because it is as to him, res inter alios

(1) In Outram v. Morewood, 3 East, 366.

(2) Fost. Disc. iii. c. 2. s. 2. p. 364, 5, 7. And see R. v. Baldwin, 3 Campb. 265; R. v. Smith, 1 Leach. Cr. C. 288, 4th Ed.

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acta. "If, therefore, it shall come out in evidence upon the trial of the accessary, as it sometimes hath, and frequently may, that the offence, of which the principal was convicted, did not amount to felony in him, or not to that species of felony, with which he was charged, the accessary may avail himself of this, and ought to be acquitted. And if it shall manifestly appear in the course of the accessary's trial, that in point of fact the principal was innocent, common justice requires that the accessary should be acquitted." Mr. Justice Foster then puts the following case. "A is convicted upon circumstantial evidence, strong as that sort of evidence can be, of the murder of B; C is afterwards indicted as accessary to this murder; and it comes out, upon the trial, by incontestable evidence, that B is still living, (Lord Hale somewhere mentions a case of this kind,) is C to be convicted or acquitted? The case is too plain to admit of a doubt. Or suppose B to have been in fact murdered, and that it should come out in evidence, *to the satisfaction of the Court and Jury*, that the witnesses against A were mistaken in his person, (a case of this kind I have known,) that A was not nor could possibly have been present at the murder. It must be admitted," continues Mr. Justice Foster, "that mere *alibi* evidence lies under a great and general prejudice, and ought to be heard with uncommon caution: but if it appears to be founded in truth, it is the best negative evidence that can be offered; it is really positive evidence, which in the nature of things necessarily implies a negative; and in many cases it is the only evidence, which an innocent man can offer. What in the case above put, are a court and jury to do? *If they are satisfied upon this evidence that A was innocent*, natural justice and common sense will suggest, what is to be done in the case of C."

Nor, for a stranger. Farther, it is laid down as a general rule, that a verdict is evidence only between the same parties, or between such as claim under the same parties; and, that a stranger cannot give a verdict in evidence against one, who was party

to the former suit. Thus, it was resolved by Ch. J. Holt and the other judges of the Court on a trial at bar, that no record of conviction or verdict can be given in evidence, but such whereof the benefit may be mutual, that is, such as might have been given in evidence either by the plaintiff or the defendant (1). And Ch. B. Gilbert lays it down (2), "that no body can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary." The same rule applies to depositions as well as to verdicts. Thus, if A prefers his bill against B, and B exhibits his bill against A and C in relation to the same matter, and a trial at law is directed, C cannot give in evidence the depositions in the cause between A and B, but the trial must be entirely as of a new cause. (3)

A judgment *in rem* in the Exchequer is conclusive as to all the world (4). And a judgment by the quarter sessions, confirming an order of removal, is conclusive upon the appellant parish, as to all the world, and may be given in evidence against them by a third parish on any subsequent appeal (5). Here it may be observed, the party, against whom the judgment was pronounced, had an opportunity of discharging themselves by proving the liability on a third parish; and this not having been done, and the court of quarter sessions having confirmed the order of removal, the last settlement is adjudged to be in the appellant parish; and, this point being once determined, the judgment must be final, that there may be some end to litigation (6). So a conviction on an indictment against a parish for not repairing a road, will not only be conclusive evidence against that parish on a second indictment, but it seems also to

(1) R. v. Warden of the Fleet, Rep. temp Holt, 134. Bull. N. P. 233. S. P.

(2) Gilb. Ev. 28. Bull. N. P. 232. The same principle is adopted by Eyre C. J. in his judgment in the Duchess of Kingston's case, 11 St. Tr.

(3) Rushworth v. Countess of Pembroke and Currier, Hardr. 472.

(4) See infrà, c. 3. s. 3.

(5) Admitted, R. v. Rislip, 2 Bott, 700; R. v. Bentley, 2 Bott, 704; R. v. Sarrat, 2 Bott, 702.

(6) Per Holt C. J. in R. v. Rislip, 2 Salk. 524. 2 Bott, 705.

have been considered as conclusive in favour of a *third* parish (1); at least, it is strong evidence.

It is more difficult to explain the two following nisi prius cases, which appear not to be consistent with the general rule. The first is the case of Whateley v. Menheim and Levy (2). That was an action of assumpsit for goods sold and delivered against two defendants, (one of whom suffered judgment by default, and the other defended,) and the question at the trial was, whether the defendants were partners at the time, when the goods had been delivered. To prove the partnership, a verdict, on an issue directed by the Court of Exchequer to try that fact, was offered in evidence, and objected to by the counsel on the other side, on the ground, that the plaintiff was not a party to the suit in the Exchequer, so that the verdict there given was res inter alios acta. But Lord Kenyon ruled "that the verdict was conclusive evidence of a subsisting partnership, and that it could not properly be deemed res inter alios acta, as both the defendants had been the parties on record in that suit, and it was open to either of them by any evidence to rebut the idea of a partnership." The other case is that of Tyley v. Cowling (3), where it is said to have been ruled by Lord Ch. J. Holt, "that a verdict with the evidence given, in an action brought by the carrier for goods delivered to him to be carried, shall be given in evidence in an action brought by the owner against the carrier for the same goods; for it is a strong proof against him, that he had the plaintiff's goods; and, in case the witness be dead, or cannot be found, is the best evidence that can be had, for it amounts to a confession in a court of record."

The reason why a verdict is not evidence *against* a person, who was neither a party to the former suit, nor claims

(1) R. v. St. Pancras, Peake N. P. C. 219.

(2) Whateley v. Menheim and Levy, 2 Esp. N. P. C. 608. See Lowfield v. Bencroft, Bull. N. P. 40.

(3) Bull. N. P. 243, cited Com. Dig. tit Evidence, (A. 5.) p. 86. 1 Ld. Ray. 744.

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under one of the parties, is, because he had no opportunity of calling witnesses, or cross-examining those on the other side, nor of appealing against the judgment. And the reason, why the verdict would not be evidence *for* a stranger, even against a party who was engaged in the former suit, seems to be, because, if he had been party to that suit instead of the person who gained the verdict, the result might have been different; for, as the parties would in that case have been constituted differently, the evidence might have varied; part of the evidence might then have appeared inadmissible, or of a doubtful character, or perhaps other evidence might have been produced by the party who lost the verdict. Under such circumstances, to admit a verdict as evidence, would be giving a party indirectly the benefit of testimony, which he might be precluded from availing himself of directly in his own suit. But this reason, it is evident, only applies, where the verdict is offered in evidence, by a third person, against the party who *failed* in the former action, and not where it is produced against the party who *succeeded*. It does not therefore apply to the case, above mentioned, of Tyley v. Cowling.

Exceptions.

There are several exceptions to the general rule, which requires, that verdicts or judgments should be admitted in evidence only between parties to the suit or privies. On a question of custom, or toll, a verdict is evidence, although between other parties (1); for the custom or toll is lex loci, and it is as reasonable to give in evidence a verdict between other parties, as to prove a payment of the duty by strangers. So on a question of customary right of common (2), or a public right of way (3), or on the liability to repair a highway (4), or on manorial or other customs (5), or on the public right of election to a parochial office (6), a verdict in

(1) City of London v. Clarke, Carth. 181. Bull. N. P. 233.

(2) 1 East, 357. 5 T. R. 413. n.

(3) Reed v. Jackson, 1 East, 355.

(4) R. v. St. Pancras, Peake, N. P. C. 219.

(5) Per Holt C. J., Carth. 181. Case of the Manchester Mills, cited in Cort v. Birkbeck, 1 Doug. 222. n. (13.)

(6) Berry v. Banner, Peake, N. P. C. 156.

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a former action between any other persons is admissible in evidence. The common reputation of the place would be evidence of the right; à fortiori, the finding of twelve men upon their oaths is evidence (1). On such questions, therefore, a verdict in an action between A and B is evidence of the point there directly determined, in an action between C and D, where the same point comes in issue; but it is clearly not *conclusive* (2). And it seems not to be conclusive evidence for or against A or B, in an action between either of them and a third person C (3); it could not be *pleaded*, in such a case, by way of estoppel. Another exception to the general rule, says Mr. Just. Buller, is in a question of pedigree, where a special verdict, between other parties, finding a pedigree, would be evidence to prove a descent (4). "Of this opinion," he adds, "was Mr. Just. Wright, in the Duke of Athol's case, which opinion is generally approved, though the determination of the rest of the Court was contrary." The other judges considered the special verdict "inadmissible, as res inter alios acta, and, for any thing they knew to the contrary, the same evidence, that was laid before the former jury, might have been then produced." (5)

Sect. II.

Of Judgments, with reference to the Subject-matter of the Suit.

The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, upon the *same matter* directly in question in another court (6). And it is a bar to any other action of the same nature as the first (7). By *actions of the same*

(1) Per Lawrence J., 1 East, 357. Gilb. Ev. 31. See ante, p. 182.

(2) Biddulph v. Ather, 2 Wils. 23.

(3) See the cases above cited, and see Mayor of Hull v. Horner, Cowp. 111. ad fin.

(4) Bull. N. P. 233.

(5) Neal d. Duke of Athol v. Wilding and another, 2 Str. 1151.

(6) See ante, p. 223.

(7) Ferrer's case, 6 Rep. 7; Cro. El. 667, S. C. Sparry's case, 5 Rep. 61. Hitchin v. Campbell, 2 Black. 827. 831.

nature,

nature, is meant, actions in a similar degree; not merely those, which have a similitude of form. All personal actions are of the same degree; therefore each is a perpetual bar (1). Thus, a judgment in an action of debt, is a bar in assumpsit on the same contract (2). And a judgment in trespass, when the right of property is determined, will be a bar in trover for the same taking (3). So, a verdict for the defendant in trover is a bar in an action for money had and received, for the money arising from the sale of the same goods (4). One great criterion for trying, whether the matter or cause of action be the same, is that the same evidence will maintain both the actions. But where the plaintiff failed in his first suit on account of some defect in pleading, or from having mistaken the form of action, the judgment will not be conclusive, and he may bring another action to try the same right. (5)

If the plaintiff, on the trial of his action, attempted to prove a demand against the defendant, and failed in the attempt, he cannot set it up again in a second action. But, if he omitted to give any evidence of the demand on the former occasion, though he had an opportunity of doing so, he is not precluded from doing it afterwards. Thus, when the plaintiff in a former action declared on a promissory note and for goods sold, but, upon executing a writ of inquiry after judgment by default, gave no evidence on the count for goods sold, the judgment was not a bar to his recovering for the goods in another action (6). So, it has been held, that an award, made on a reference of all matters in difference between the parties, is no bar to any cause of action, which the plaintiff had against the defendant at the time of the reference, if it appear that the subject-

(1) 2 Black. 831.

(2) Slade's case, 4 Rep. 94. Com. Dig. tit. Action, K. 3.

(3) Com. Dig. Ib. Putt v. Roster, 2 Mod. 319; 3 Mod. 1, S. C; Sir T. Raym. 472, S. C. 2 Black. Rep. 831.

(4) Hitchin v. Campbell, 2 Black. 827.

(5) Robinson's case, 5 Rep. 33. 6 Rep. 8. a. Com. Dig. tit. Action, L. 4. 2 Black. 831.

(6) Seddon v. Tutop, 6 T. R. 607.

matter of the action was not inquired into before the arbitrator. (1)

In considering the effect of a former judgment, it is to be observed that the judgment, whether it be pleaded in bar, or given in evidence where special pleading is not required, can be final only for its own proper purpose and object, with reference to the subject-matter of the suit, and upon the points there put in issue and directly determined. Therefore, in an action for obstructing a watercourse, where a verdict for the plaintiff in a former action, which had been brought against the defendant for another obstruction to the same watercourse, was offered in evidence under the general issue, Lord Mansfield held, that the plaintiff had not obtained such a determination of his right, by the former verdict, as the law considered conclusive (2). And this decision has been recognized and confirmed in a very elaborate judgment, before referred to, on the nature of estoppels. (3)

A judgment in one action of ejectment is not conclusive in another, in consequence of the fictitious nature of the proceedings. However, it is conclusive evidence of the plaintiff's title, against the tenant in possession, in an action for mesne profits; for the plaintiff to entitle himself to recover in an ejectment, must shew a possessory right not barred by the statute of limitations. This judgment, like all others, only concludes the parties, as to the *subject-matter*. It proves nothing, *beyond* the time laid in the demise; because, beyond that time the plaintiff has alleged no title, nor could be put to prove any. As to the length of time also, during which the tenant has occupied, or as to the value, the judgment proves nothing, for the same reason. (4)

(1) Ravee v. Farmer, 4 T. R. 146.
(2) Sir F. Evelyn v. Haynes, cited in Outram v. Morewood, 3 East, 365.
(3) Per Ld. Ellenborough in Outram v. Morewood, ib.
(4) Aslin v. Parkin, 2 Burr. 668.

There is a difference, it has been said, between real actions and personal actions, as to the conclusiveness of a judgment. "In a personal action, as debt, account, &c. the bar is perpetual; for the plaintiff cannot have an action of a higher nature, and has no remedy but by error or attaint (1). But if the plaintiff be barred, in a real action, by judgment on a verdict, demurrer, confession, &c. yet he may have an action of a higher nature, and try the same right again; because it concerns the freehold and inheritance (2)." Now, although it is true that the same matter may be thus tried again, yet the former judgment is no less conclusive upon the immediate right then in demand, as far as that former judgment purports to bind, and against all such persons, as it is competent by law to bind (3). A judgment is final for its own proper purpose and object, and no further. A recovery in any suit, upon issue joined on matter of title, is conclusive upon the subject-matter. Thus, a finding upon title in trespass not only operates, as a bar to the future recovery of damages for a trespass founded upon the same injury, but operates also as an estoppel to any action for an injury to the same supposed right of possession. (3)

Sect. III.

Of the Admissibility, in Civil Cases, of Verdicts in Criminal Proceedings.

It does not appear to be clearly settled, whether verdicts, which have been given in criminal proceedings, can be admitted as evidence in civil cases. In the case of Hillyard and Grantham (4), which was an issue directed by the Court of Chancery to try a question of legitimacy, a sentence, against the supposed father and mother, upon a proceeding against them in the Consistory Court of Lincoln, for living together in fornication, was offered

(1) 1st Resol. Ferrer's case, 6 Rep. 7.

(2) See the judgment in Outram v. Morewood, 3 East, 359.

(3) Ib. 354.

(4) Cited by Lord Hardwicke in Brownsord v. Edwards, 2 Ves 246. and in Rep. temp. Hard. 311.

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in evidence, to prove that they were not married; but the whole Court of King's Bench were of opinion, on a trial at bar, that the sentence could not be given in evidence; "because, first, it was a criminal matter, and could not be given in evidence in a civil cause; next, because it was res inter alios acta, and could not affect the issue: but they held, that, if it had been a sentence on the point of marriage in a question on the lawfulness of the marriage, it might have been given in evidence, being the sentence of a court having proper jurisdiction."

And in the case of Gibson v. Maccarty (1), on an issue to try the genuineness of some promissory notes, depositions of a deceased witness having been read on the part of the plaintiff, (in which depositions the witness swore, that the defendant had acknowledged the notes in question and also another note,) it was proposed, on the part of the defendant, to shew by a record of conviction, that the plaintiff had since been convicted of forging this other note, mentioned by the deponent; for such evidence, it was said, would go to the credit of the deponent's evidence, as to the acknowledgment of the notes in question; and, secondly, because there is at all times a liberty given to examine into the plaintiff's character. But this evidence was opposed on the part of the plaintiff, (on the ground, that no record of a criminal action can be given in evidence in a civil suit, because such a conviction might have been upon the evidence of a party interested in the civil action,) and Lord Hardwicke is reported to have said, "that the general rule was as had been stated by the plaintiff's counsel (2), and that it had been so strictly kept, that in the case of the Hillyards, on a question of legitimacy, the Court refused to admit a sentence of excommunication in the spiritual court for fornication between the father and mother of the party, whose legitimacy was impeached."

(1) Rep. temp. Hard. 311.

(2) Acc. per Sir J. Mansfield C. J. in Hathaway v. Barrow and Others, 1 Campb. 151.

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In a third case (1) to be found on this subject, upon an issue to try the question of devise or no devise, a coroner's inquest, finding the deceased a lunatic, was offered in evidence against the plaintiff, who claimed as executrix, for the purpose of shewing, that the deceased was incompetent to make a will; this evidence was objected to on the part of the plaintiff, and the court were equally divided in opinion. The Chief Justice (Parker) was of opinion that the inquest ought to be admitted, "because it was for the plaintiff's advantage, as the personal estate would be saved by the finding of lunacy," and he added, that in Lord Derby's case an inquest post mortem was allowed to be given in evidence. Mr. Justice Powys agreed with the Chief Justice. Mr. Justice Eyre said, "This is a criminal matter, and ought not to be given in evidence in a civil proceeding. A verdict on an indictment for battery cannot be read in an action for the same battery. An inquest post mortem is in the nature of a civil proceeding, but this is criminal, for it might induce a forfeiture of the goods, if he had been found felo de se." And Mr. Justice Pratt said, "If a verdict be given in evidence it must be between the same parties, and, therefore, an indictment at the suit of the king cannot be read in an action at the suit of the party.

The objections, then, against the admissibility of such evidence, seem to be, first, that the parties are not the same in the civil suit as in the criminal case; and secondly, that the party in the civil suit, on whose behalf the evidence is supposed to be offered, might have been a witness on the prosecution. On the other hand, it may be said, that, although the prosecution was conducted in the name of the king, no kind of injustice can be done to the defendant in admitting the record of conviction as evidence against him on the points there in issue, since he had a full opportunity at the trial of defending himself, and, if he

(1) Jones v. Waite, Tr. at bar, 1 Str. 68.

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could, of disproving the charge: and, with regard to the second objection, it cannot, at least, apply to cases where the party, who offers the judgment in evidence, was not in fact a witness on the prosecution, or where from the nature of the case he could not have been admitted.

Mr. Justice Buller lays down the rule generally (1), "that a conviction in a court of criminal jurisdiction is conclusive evidence of the fact, if it afterwards come collaterally in controversy in courts of civil jurisdiction. As, suppose the father convicted on an indictment for having two wives, this, he says, would be conclusive evidence in an action of ejectment, where the validity of the second marriage is in dispute *." However, it seems very questionable whether the verdict, in such a case, would be admitted as *conclusive*. In the Duchess of Kingston's case (2), Lord Ch. J. Eyre, in delivering his judgment, said, that if an offender is convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself may be traversed by a purchaser, whose conveyance would be affected, as it stands; and even after a conviction by verdict, he may traverse the time.

If the rule is, as Mr. Justice Buller has laid down, that a record of conviction may be given in evidence, on the same matter in a civil suit, it must be understood at least

(1) Bull. N. P. 245. (2) 11 St. Tr. 261.

who was libelled in the spiritual court in a cause of jactitation of marriage, applied to the Court of King's Bench for a prohibition, suggesting that the complainant had been convicted of bigamy in marrying her; and the Court of King's Bench granted the prohibition. The best report of this case is in Comberbach, whence it appears that Holloway C. J. and Allibone J. granted the prohibition against the opinion of Powell J., "because, they said, the libel is for jactitation, and the ecclesiastical court will not allow the plea." Nothing further is to be found in the case, to support the general position laid down by Mr. Justice Buller.

(1) 3 Mod. 164. Comberb. 72. S. C.

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with this limitation, that the party aggrieved was not a witness on the prosecution. To admit the record as evidence on any other condition, would be in effect to allow the party to a suit to give evidence for himself. The record, in such a case, seems upon every principle inadmissible; and the rule must be the same, whether the conviction was founded solely on the prosecutor's testimony, or whether his testimony was corroborated by other evidence. Thus, on a trial for perjury committed in an answer to a bill of injunction, the person who was sued by the defendant in an action then pending, and who in consequence filed the bill, was thought to be a competent witness (1), on the ground that a conviction, procured by his testimony, could not be used by him for obtaining relief in equity against the defendant's action at law (2). So a conviction for an assault before a magistrate, on the information of the injured party, is not evidence in an action for the same assault (3). Ch. B. Gilbert seems indeed to have been of opinion, that, where the verdict in the criminal prosecution is supported by other testimony, besides that of the party who wishes to avail himself of it in the civil suit, there the verdict may be properly received in evidence: for, though the verdict, he says, may be diminished in point of authority by shewing that it was partly founded on the oath of the party interested in the action, yet the jury ought to respect it no further than as they presume it was given and supported by other witnesses not concerned in the cause (4)." It may still, however, be objected, that the fact might have found credit from the party's oath, and since this evidence is so intermixed, that it cannot appear on what the jury relied, the verdict ought not to be admitted at all as evidence.

Though a conviction, says Mr. Justice Buller, in a court of criminal jurisdiction is conclusive evidence of the fact,

(1) R. v. Boston, 4 East, 581. Burdon v. Browning, 1 Taunt. 521.

(2) Bartlet v. Pickersgill, 4 East, 577. n. (*b*).

(3) Smith v. Rummens, 1 Campb. 9.

(4) Gilb. Ev. 26.

if it afterwards come collaterally in controversy in a court of civil jurisdiction: yet an acquittal, which does not, like a conviction, ascertain facts, is no proof of the reverse. (1)

(1) Bull. N. P. 245. Gilb. Ev. 32. A verdict of not guilty, on an indictment against a parish for not repairing a road is said not to be evidence for the parish on a second indictment, R. v. St. Pancras, Peake. N. P. C. 219. As to acquittals in the exchequer, see infrà, c. 3. s. 3. ad fin.

CHAP. III.

On the Judgments of Courts of exclusive Jurisdiction.

THE great principle, on this subject, is, that a judgment of a court of exclusive jurisdiction, directly upon the point, is conclusive, between the same parties, upon the same matter coming incidentally in question in another court for a different purpose: but that the judgment either of a court of concurrent or exclusive jurisdiction is not evidence of any matter, which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. (2)

But, although such sentences are conclusive, and cannot be impeached from within, yet, like all other acts of the highest judicial authority, they are impeachable from without (3). Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it vitiates all judicial acts, whether ecclesiastical or temporal. (4)

In treating of this subject, it is proposed to consider,

1. Sentences of Ecclesiastical Courts: 2. Sentences of Courts of Admiralty, and of Foreign Courts: 3. Judgments

(2) 11 State T. R. 261. Judgment of Ch. J. De Grey in Duchess of Kingston's case.

(3) Ib. 262.

(4) Fermor's case, 3 Co. Rep. 78. b.

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in rem in the Exchequer, and by Commissioners of Excise: 4. Sentences by a College in one of the Universities, and Convictions before Magistrates.

Sect. I.

Of Sentences in the Ecclesiastical Courts.

Spiritual courts have the sole and exclusive cognizance of questioning or deciding directly the legality of marriage. And the temporal courts have an inherent power of deciding incidentally as far as temporal rights are concerned, either upon the fact or legality of a marriage, when they form a part of some more general issue within their cognizance, or are in some way connected with the decision of the proper object of their jurisdiction. But where, in civil causes, the temporal courts find the question of marriage directly determined by the ecclesiastical court, they receive the sentence as conclusive proof of the fact, it being an authority accredited in a judicial proceeding by a court of competent jurisdiction (1). They receive it upon the same principles, and subject to the same rules, by which they admit the acts of other courts. A sentence of nullity, therefore, and a sentence in affirmance of marriage, have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to a real estate (2). So, a sentence in a cause of jactitation has been received as evidence against a marriage, upon a title in ejectment, and in personal actions immediately founded on a supposed marriage (2). In all these cases, said C. J. De Grey (3), the parties to the suit, or at least the parties, against whom the evidence was received, were parties to the sentence, and had acquiesced under it, or claimed

(1) Judgment of De Grey C. J. 11 St. Tr. 261. Bunting's case, 4 Co. Rep. 29. Kenn's case, 7 Co. Rep. 42. Jones v. Bow, Carth. 225. Da Costa v. Villa Real, 2 Stra. 960.

(2) 11 State Tr. 261.

(3) Ib.

under those, who were parties and had acquiesced. And, in general, the sentences of the spiritual court are not evidence, except against the parties to the suit, in which the judgment was given, or against those claiming under them. To make them conclusive against strangers, would be giving them an effect beyond what a judgment in the courts of common law is allowed to have. In a few particular instances, indeed, namely, where issue is joined on the record in certain real writs, on the legality of marriage, or, its immediate consequence, general bastardy, or on the fact of profession or deprivation, in those cases upon the issue so formed the mode of trying the question is by reference to the ordinary, and his certificate, when returned and entered on record in the temporal courts, is a perpetual and conclusive evidence against all the world on that point; which exceptionable extent was the occasion of a statute in the reign of Henry the Sixth, requiring certain public proclamations to be made, for persons interested to come in and be parties to the proceeding. (1)

A sentence in a cause of jactitation, also, is evidence against a marriage, and has been received as such, upon a title in ejectment, and in personal actions immediately founded upon a supposed marriage (2); but it will not, like a sentence of nullity, be *conclusive* evidence. They are sentences of a very different nature and operation. A cause of jactitation is ranked as a cause of defamation only, and not as a matrimonial cause, unless when the defendant pleads a marriage: and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, still the sentence has only a negative and qualified effect, namely, that the party has failed in his proof, and that the libellant is free from all matrimonial contract "as far as yet appears," leaving it open to new proofs of the same marriage in the same cause, or to any

(1) See the judgment by De Grey C. J., 11 St. Tr. 261.

(2) 11 St. Tr. ib.

other

other proofs of that or any other marriage in another cause: and if such sentence is no plea to a new suit in the ecclesiastical court, and is not conclusive there, it cannot conclude another court, which receives the sentence, from going into new proofs to make out that or any other marriage (1). Admitting the sentence in its full extent and import, it only proves that it did not yet appear that the parties were married, and not that they were not married at all; and, by the rule laid down by Ld. Ch. J. Holt (2), such sentence cannot be proof of any thing to be inferred by argument from it; and therefore it is not to be inferred, that there was no marriage at *any* time or place, because the court had not then sufficient evidence to prove a marriage at a *particular* time and place. In the Duchess of Kingston's case, therefore, on a charge of polygamy, where a sentence in the spiritual court in a cause of jactitation of marriage was offered as conclusive evidence to disprove the second marriage, the judges held, that this sentence, (even admitting it to be evidence on a criminal prosecution,) could not be conclusive, but that the sentence and the judgment of the Lords might well stand together, and both propositions be true. The sentence would only prove, that it did not then appear that the parties were married; but, because the court had not then sufficient proof of the marriage specified, it could not be inferred, that there was no marriage between them at any other time or place.

The ecclesiastical courts have also exclusive authority in deciding on the validity of wills of things personal, and in granting administration (3). And their sentences, pronounced in the exercise of this sole and exclusive jurisdiction, are so binding on the temporal courts, as to be conclusive evidence of the right directly determined. Thus a probate unrepealed is conclusive evidence, in civil cases, of the validity of a will: and therefore payment of money to an executor, who has obtained probate of a forged will, is

(1) 11 St. Tr. 261.
(2) Blackham's case, 1 Salk. 290.
(3) Noel v. Wells, 1 Lev. 235. 1 Ld. Ray. 262. 3 T. R. 130.

a discharge to the debtor of the intestate, though the probate be afterwards declared null and void (1). But the sentence is evidence only of the point directly determined; it will not be evidence of any collateral matter, which may possibly be collected or inferred from the sentence by argument. (2)

The adverse party may shew that the probate is forged, because such evidence supposes, that the spiritual court has given no judgment; or, if the probate was granted by an inferior court, that the testator left bona ratabilia, for then the court had not jurisdiction (3). But evidence will not be admitted, to prove, that another person was appointed executor, or that the testator was insane (4): that would be to falsify the proceedings of the ordinary in cases, where he is exclusive judge. The probate of a will, devising real property, is not evidence of the contents of the will (5), even though the original is proved to be lost (6); the spiritual court having no power to authenticate such a devise, as far as it relates to land.

It appears then, that the sentence of an ecclesiastical court, directly upon a point within its peculiar jurisdiction, is conclusive on the same matter, coming incidentally into question in a civil case in another court. But although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under a different consideration (7); first, because the parties are not the same, for the king, (in whom the trust of prosecuting public offences is vested, a trust executed by his immediate orders, or in his name by some prosecutor,) is not a party to such proceedings in the ecclesiastical court, and cannot be admitted to defend, examine witnesses, or in any

(1) Allen v. Dundas, 3 T. R. 125.
(2) Blackham's case, 1 Salk, 290. See ante, p. 245.
(3) 1 Sid. 359. Bull. N. P. 247.
(4) 1 Lev. 236.
(5) Bull. N. P. 245.
(6) Doe d. Ash v. Calvert, 2 Campb. 389. Hoe v. Nathrop, 1 Ld. Ray. 154. St. Leger v. Adams, ib. 731. Dike v. Polhill, ib. 744.
(7) 11 St. Tr. 261.

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manner intervene or appeal: secondly, such doctrine would tend to give the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs. The case of the King v. Vincent (1), therefore, (where the probate of a will is said to have been admitted as conclusive evidence of its validity, on an indictment for the forgery of the same will,) has been frequently much questioned, and at length expressly overruled. (2)

For the same reason, a sentence in a spiritual court on the question of marriage will not preclude inquiry on a criminal charge of polygamy; unless it is made to have such an effect by an express provision of the legislature. Now, by the statute of 1 J. 1. c. 11. which makes polygamy a felonious offence, and for the trial of this offence necessarily gives to the temporal courts a cognizance of the lawfulness of marriage, it is provided that the act "shall not extend to any persons divorced by a sentence in the ecclesiastical court, nor to any persons where the former marriage has been by the ecclesiastical court declared null and void." There are two cases, then, put by the statute, in which the sentence of the ecclesiastical court will protect against the criminal inquiry, namely, sentence of divorce and sentence of nullity of marriage (3). But the statute makes no exception in favour of a sentence in a cause of jactitation: and as such a sentence is not conclusive even in the court where it was delivered, and declares not directly but only collaterally the invalidity of marriage, it has been adjudged not to be a bar to a criminal prosecution. (4)

It has been before mentioned, that judgments and sentences of courts of justice, or any other judicial act, may

(1) 1 Str. 481.

(2) R. v. Gibson, Lanc. Sum. Ass. 1802, before Ld Ellenborough C. J. stated by Mr. Evans in the 2d vol. of his edition of Pothier, p. 356.

(3) 1 East, P. C. 467.

(4) Duchess of Kingston's case, 11 St. Tr. 260.

be impeached by evidence of fraud or collusion. And such evidence was adjudged to be admissible, on the part of the prosecution, in the case of the Duchess of Kingston, who was tried for polygamy. A distinction, in this respect, has been made between the case of a stranger, (who cannot come in and reverse the judgment, and therefore of necessity he must be permitted to aver, that it was fraudulent,) and the case of a party to the proceedings, (who cannot give evidence of fraud, but must apply to the Court, which pronounced the judgment, to vacate it;) and therefore, in the case Prudham v. Phillips (1), where the defendant proved her marriage with one M., in answer to which a sentence of an ecclesiastical court was produced, shewing that she was at the time married to another person, Chief Justice Willes after much debate refused to allow the defendant to prove that the sentence had been obtained by fraud.

Sect. II.

Of Sentences in Courts of Admiralty and Foreign Courts.

The Judge of the Admiralty has the sole and exclusive cognizance in questions of prize or not prize at sea (2). The true reason of this rule is, that prizes are acquisitions jure belli, and the jus belli is to be determined by the law of nations, and not by the particular municipal law of any country. A sentence therefore in the prize court, deciding the question of prize, is conclusive, in all it professes to decide, on the same point incidentally arising in courts of common law. "It has been clearly settled, (said the Master of the Rolls in the case of Kindersley against Chase (3),) from the time of Lord Hale down to the present period, that a sentence of condemnation in a court of admiralty is conclusive, when

(1) Ambler, 763. cited by the L. Ch. from a MS. note of Serjt. Parker.

(2) Tompson v. Smith, 1 Sid. 320. Brown v. Franklyn, Carth. 476. Le Caux v. Eden, 2 Doug. 600. Lindo v. Rodney, n. (1), ib.

(3) Cockpit, July 1801, Park Insur. last edit. 490.

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it proceeds on the ground of enemy's property, that the property belongs to enemies, and not only for the immediate purpose of such a sentence, but it is binding on all courts and against all persons. The sentence of a court of admiralty proceeding in rem, must bind all parties, must bind all the world."

The sentence of a foreign court of admiralty, also, which is acknowledged by the law of nations and of competent jurisdiction, deciding the question of property, is conclusive, if the same question arise in this country (1). And though in the case of Hughes and Cornelius, the leading case on this subject, the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of assurance, (where the non-compliance with a warranty of neutrality is in dispute,) yet, from that period down to the present, the doctrine there laid down has been considered equally applicable to questions of warranty in actions on policies, as to questions of property in actions of trover (2). And it may now be assumed as the settled doctrine of courts of English law, that all sentences of foreign courts, of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies of assurance, on every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially (3). It is now too late, said Mr. Just. Lawrence (4), to examine the practice of admitting these sentences to the extent to which they have been received, supposing that practice might at first have appeared doubtful. On the authority of those decisions men have acted for a long series of years, and entered into contracts of assurance in this country, with a knowledge of such decisions, and in expectation that the

(1) Hughes v. Cornelius, 2 Show. Rep. 232. Sir T. Ray. 473. S. C. Bernardi v. Motteux, 2 Doug. Rep. 575.

(2) Per Chambre J., Lothian v. Henderson, 3 Bos. & Pull. 513.

(3) Bolton v. Gladstone, 5 East, 160. Christie v. Secretan, 8 T. R. 196. Kindersley v. Chase, Park Ins. 486.

(4) Lothian v. Henderson, 3 Bos. & Pull. 524. See also Baring v. Clagett, 3 Bos. & Pull. 214.

questions,

questions, arising out of such contracts, to which the decisions are applicable, will be ruled by them. Such a sentence of condemnation will be binding on the rights of third persons, as well as on the parties to the original suit; it is conclusive between the assured and the underwriter, with respect to every fact, which it professes to decide. Thus, when it proceeds on the ground of enemy's property, it is conclusive, that the property belongs to enemies, not only for the immediate purpose of such a sentence, but it is binding on all courts and as against all persons (1). And the sentence is binding, whether it proceed to condemn the ship expressly as being enemy's property, or whether such a ground of decision can only be collected from other parts of the proceedings; and this, although it appear on the face of the sentence, that the prize-court arrived at the conclusion through the medium of rules of evidence and rules of presumption, established only by the particular ordinances of their own country, and not admissible on general principles. (2)

The sentence is conclusive evidence of the points, upon which it professes to decide (3). Thus, for example, if it proceeded upon the ground of the property not being neutral, it is conclusive against the insured, that he has not complied with his warranty (4). If no special ground is stated, and the ship is condemned generally as lawful prize, it is to be presumed from the condemnation, as no other cause appears, that the sentence proceeded on the ground of the property belonging to an enemy; and the sentence, in such a case, has been held to be conclusive evidence, that the property was not neutral (5). In the case of Bernardi v. Motteux (6), where there was some ambiguity

(1) Kindersley v. Chase, Park Ins. 490.

(2) Bolton v. Gladstone, 5 East, 155. 2 Taunt. 85. Baring v. Roy. Ex. Ass. Comp. 5 East, 99.

(3) Christie v. Secretan, 8 T. R. 196. See also (3), ante, p. 249.

(4) Barzillay v. Lewis, Park Insur. last edit. 469. Baring v. Clagett, 3 Bos. & Pull. 201.

(5) Saloucci v. Woodmass, Park Ins. 471. (1784.) 8 T. R. 444.

(6) 2 Doug. 574. (1781.) 3 Bos. & Pull. 215.

in the sentence, so that the precise ground of the determination could not be collected, the Court of King's Bench considered themselves at liberty to examine, whether the ground, on which the sentence proceeded, but which was not stated, actually falsified the warranty contained in the policy. Hence it follows, that it does not lie on the party, who produces the sentence, to shew that it has proceeded on the ground of enemy's property; but it is incumbent on the other party, who objects to the sentence, to shew that it proceeded on some other ground. (1)

Where the sentence professes to be made on particular grounds, which are set forth in the sentence, but which appear not to warrant the condemnation, the sentence will not be conclusive as to such facts (2). Or if the sentence has not decided the question of property, nor declared whether it be neutral, but condemned the property as prize solely on the ground, that the ship had violated an *ex parte* ordinance, to which the neutral country had not assented, or on the ground of a foreign ordinance against the law of nations, such a sentence, though conclusive of the question of prize or no prize, would not be conclusive of the fact, whether or not the ship were neutral (3). Lastly, sentences of condemnation in foreign courts of prize are admissible only, where such courts are constituted according to the law of nations, and exercise their functions either in the belligerent country, or in the country of a co-belligerent or ally in the war (4). It has, therefore, been determined, that a sentence pronounced by the authority of the capturing power, within the dominions of a *neutral* country, to which the prize may have been taken, is illegal (5), and consequently would not be admissible evidence to falsify the warranty of neutrality.

(1) Kindersley v. Chase, Park Ins. 490.

(2) Calvert v. Bovil, 7 T. R. 523. 8 T. R. 444.

(3) Pollard v. Bell, 8 T. R. 444. Bird v. Appleton, 8 T. R. 562. Baring v. Clagett, 3 Bos. & Pull. 215. Bolton v. Gladstone, 2 Taunt. 85. 95.

(4) Oddy v. Bovil, 2 East, 473.

(5) Havelock v. Rockwood, 8 T. R. 268. Case of the Flad Oyen, 8 T. R. 270. n. (*a*); 1 Rob. Adm. Rep. 135.

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Judgments of other foreign courts.

The sentence of any other foreign court of competent jurisdiction, directly deciding a question which was properly cognizable by the law of the country, seems to be conclusive here, if the same question arise incidentally between the same parties in this country. Thus the sentence of a foreign court of competent jurisdiction, directly establishing a marriage in that country, would be conclusive, in any of our courts, on the validity of the marriage (1). So, where a party, having accepted a bill of exchange drawn upon him at Leghorn, instituted a suit there, in which suit his acceptance was vacated, and, upon his return to this country, being sued again on his acceptance, applied to the court of Chancery for an injunction and relief against the second action, Lord Chancellor King decided that the cause was to be determined by the law of the country, where the bill was negotiated, and, as the acceptance had been there declared void by a competent jurisdiction, he thought the sentence must here also be conclusive (2). So on a criminal charge, as for murder committed in a foreign country, an acquittal in that country might be pleaded here in bar to an indictment for the same offence (3); because, says Mr. Justice Buller, a final determination in a court having competent jurisdiction is conclusive in all courts of concurrent jurisdiction (4). From the two last cases, the following principle seems to be properly deducible, namely, that a party, who has been once discharged from a criminal charge or a legal demand by the sentence of a foreign court of competent jurisdiction, may protect himself by that sentence against any fresh suit or prosecution instituted here for the same cause.

If an action is brought in this country, as an action of debt or assumpsit, directly upon a foreign judgment, the sentence has been considered primâ facie evidence of the debt,

(1) Per Lord Hardwicke, in Roach v. Garvan, 1 Ves. 159.

(2) Burrows v. Jemino, 2 Stra. 733.

(3) Hutchinson's case, cited 1 Show. Rep. 6.; also in 2 Str. 733.

(4) Bull. N. P. 245. Roche's case, 1 Leach. Cr. C. 160. acc.

debt, but not conclusive. Lord Kenyon, indeed, in the case of Galbraith v. Neville (1), which was an action of debt on a judgment in the supreme court of Jamaica, said he entertained serious doubts concerning the doctrine laid down in the case of Walker v. Witter (2), that foreign judgments are not binding upon the parties here; and after referring to a case, which might seem to point against his opinion, he added, "that is not an authority for saying that we can revise the judgments of the lowest courts in foreign countries, where they have competent jurisdiction." However, Mr. Just. Buller, in the same case, said, "The doctrine which was laid down in the case of Sinclair v. Fraser has always been considered the true line ever since, namely, that the foreign judgment shall be primâ facie evidence of the debt, and conclusive, till it be impeached by the other party." "As to actions of this sort," he continued, "see how far the court would go, if what was said in the case of Walker v. Witter were departed from. It was there held, that the foreign judgment was only taken to be primâ facie evidence, that is, we will allow the same force to a foreign judgment, that we do to those of our own courts not of record (3): but if the matter were carried farther, we should give them more credit; we should give them equal force with those of courts of record here. Now a foreign judgment has never been considered as a record: it cannot be declared on, as such, and a plea of nul tiel record, in such a case, is a mere nullity. How then can it have the same obligatory force? In short, the result is this; that it is primâ facie evidence of the justice of the demand in an action of assumpsit, having no more credit than is given to every species of written agreements, namely, that it shall be considered as good, till it is impeached." And, in the case of Philips v. Hunter (4), Eyre C. J. said, "It is in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts,

(1) 1 Doug. Rep. 5. n. (2).; and 5 East, 475. n. (*b*). S. C.

(2) 1 Doug. 1.

(3) Acc. Ld. Mansfield in Herbert v. Cook, Willes Rep. 37. n. (*a*).

(4) 2 H. Black. 410., in error.

and

and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it not as obligatory to the extent, to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent, to which by our law sentences and judgments are obligatory, not as conclusive, but as matter *in pais*, as a consideration primâ facie sufficient to raise a promise. We examine it, as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by the law."

Sect. III.

On Judgments in rem in the Exchequer, and by Commissioners of Excise.

A judgment of condemnation in the court of Exchequer, where proceedings in rem have been instituted, is conclusive evidence in any other court, as to all the world, that the goods were liable to be seized (1). The jurisdiction of the court of Exchequer in this case is not only competent, but sole and exclusive: and though no formal or express notice is given to the owner of the goods in person, yet he has sufficient notice to try the point of forfeiture, by the seizure of his property, by the proclamations according to the course of the court, and by the writ of appraisement.

Whether a condemnation by the commissioners of excise ought to have the same conclusive operation, as a judgment of condemnation in the court of Exchequer, has not been clearly settled. In the case of Henshaw v. Pleasance, which was an action of trespass, brought against a revenue

(1) Scott v. Shearman, 2 Black. Rep. 979. Per Ld. Kenyon C. J. in Geyer v. Aguillar, 7 T. R. 696. Bull. N. P. 244.

officer,

officer, for seizing goods supposed to have been irregularly lodged and concealed, a sentence of condemnation by commissioners of excise was offered as conclusive evidence against the plaintiff; but Mr. Just. Blackstone, who tried the cause (1), refused to admit it to that extent, directing the jury that such a sentence was evidence, but not, like a condemnation in the Exchequer, conclusive. On a motion afterwards for a new trial, upon this supposed misdirection, the court of Common Pleas confirmed the Judge's opinion. "The reasons and authorities, it was said, relied on in the case of Scott v. Shearman, and other cases of the same kind, extend only to condemnations in the Exchequer, which is the king's supreme court of revenue, but not to the inferior jurisdiction of the boards of excise and customs."

From the report of the case of Scott v. Shearman (2), it appears, that the ground of Mr. Just. Blackstone's opinion was, "that implicit credit ought to be given to any judgment *in a court of record*, which has competent jurisdiction of the subject-matter, and that the jurisdiction of the court of Exchequer was in such a case not only competent, but sole and exclusive." The opinions of C. J. De Grey and the other Judges are not reported. They agreed in thinking the judgment of condemnation in the court of Exchequer conclusive evidence of the right of seizure, but it does not appear, whether they thought it conclusive on the ground of its being a judgment of a court of record. Nor is this reason stated as the ground of determination in any of the authorities referred to by Mr. Just. Blackstone. A different principle was certainly established in the case of the Duchess of Kingston (3), where De Grey C. J. in an elaborate judgment delivered the unanimous opinion of the Judges; and it is observable, that he pronounced this judgment within a year after the determination of the court in

(1) Lond. Sitt. 1778, 2 Blac. Rep. 1174.

(2) 2 Blac. Rep. 979.

(3) See ante, p. 242.

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the case of Scott and Shearman. The principle there established, is not confined to the judgments of courts of record, some of which are of a very inferior description, but extends equally to every court of competent or exclusive jurisdiction; and the examples cited by C. J. De Grey, in illustration of this principle, are all drawn from the proceedings in ecclesiastical courts, none of which are classed among courts of record. It seems therefore correct to infer, from the rule established in the Duchess of Kingston's case, as well as from analogy to several cases mentioned in the course of the present chapter, that a sentence of condemnation by commissioners of excise will be conclusive, on the right of seizure coming incidentally into question in any other court, in all cases where by act of parliament they have a sole or exclusive jurisdiction.

In support of this position, the following authorities may be cited. First, in an action of trover against commissioners of excise (1), for levying the plaintiff's goods by their warrant under statute 12 C. 2. c. 23., the point was, whether, after they had adjudged low wines to be strong wines perfectly made, their judgment could be drawn in question again, so as to make the officers chargeable. The Court gave judgment for the plaintiff, on the ground, that the defendants had exceeded their jurisdiction. Rainsford B. said, that the defendants might well enough have justified by virtue of an authority from the commissioners of excise, who are judges of the fact, and whose authority is not traversable by the plaintiff, and that the plaintiff here must have taken his remedy by appeal and no otherwise. But if the commissioners exceed their authority, and that appear to the Court, then their proceedings are coram non judice, and an action of trespass lies. But if that does not appear, it must be otherwise. Hale C. B., and the other judges present, argued to the same effect.

(1) Terry v. Huntington and Others, Hardr. 480., cited by Holt C. J. in Dr. Groenvelt v. Dr. Burwell, 1 Ld. Raym. 471.

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In another case, which was an action of trespass against commissioners of excise (1) for taking the plaintiff's money, the defendants pleaded not guilty, and gave in evidence their warrant and a judgment against the plaintiff, on an information against him for an offence against an excise law. It was objected on behalf of the plaintiff that this judgment was not peremptory, and that the plaintiff in this action was at liberty to disprove the truth of the matter of fact, upon which the defendants grounded their judgment. But this was denied by the Court, and a distinction was taken, namely, that if the commissioners had intermeddled with a thing which was not within their jurisdiction, then all is coram non judice, and that may be given in evidence upon this action; but it is otherwise, if they are only mistaken in their judgment in a matter within their cognizance, for that is not inquirable, otherwise than upon an appeal.

A third case may be cited to the same effect. In an action of trover for a quantity of tea (2), it appeared in evidence that the plaintiff sent the tea for one Lloyd with a permit, but the porter in his way called at the house of one R., and set it down there, where the defendant, an excise officer, seized it as forfeited, for being brought to R.'s house for R.'s use, without a permit to that place, according to the statute 10 G. 1. c. 10. s. 16. Upon not guilty pleaded, the defendant, to shew that the property was out of the plaintiff, produced a condemnation by the commissioners of excise upon an information against R. for receiving this tea without a permit, which sentence, it was insisted, was conclusive evidence of that fact, being a judgment before a proper jurisdiction. On the other side it was insisted, that the plaintiff was no party to the suit; that R. had nothing to do with the tea; and that, if he made a feigned defence, or, as the case was, made default, yet the plaintiff ought not to be affected by that, but might

(1) Fuller v. Fotch, cor. Holt C. J., Carth. 346. Rep. temp. Holt, 287, S. C.

(2) Roberts v. Fortune, cor. Lee C. J., sittings after Easter term 1742, 1 Hargr. Law Tracts, p. 468. n. from Ford's MS.

shew,

shew, that this was a case not subject to forfeiture. But Lee C. J. said, "The judgment of forfeiture is a judgment on the thing itself. How the tea came to R.'s house was a matter proper for the consideration of the commissioners; and, if the plaintiff was willing to have defended the suit, he might have come in pro interesse suo, which as he has not done, his property is bound. There is no more in this than the common case, namely, that courts of law pay such deference to the judgment of each other in matters within their jurisdiction, that the first determination by a proper authority ought to prevail: so that, the tea being forfeited, the property could not be in the plaintiff." And upon this the plaintiff was nonsuited.

An acquittal in the Exchequer was considered by Lord Kenyon, in the case of Cooke v. Sholl (1), to be conclusive evidence of the illegality of the seizure. That was an action of trover for several pipes of wine seized by the defendant for want of a permit. At the trial of the cause, the plaintiff gave in evidence a record of acquittal in the court of Exchequer. The defendant then insisted, that, under the circumstances of this case, the permit had expired, before the seizure was made; and Mr. Just. Heath, who tried the cause, was of that opinion; but, on its being suggested, that there had been a different determination in the court of Exchequer, he reserved the point for the opinion of the court of King's Bench, with liberty to enter a verdict for the defendant, if it should be adjudged for him. When the case came before the Court, Lord Kenyon thought the record of acquittal precluded all reasoning on the construction of the permit: but as the question respecting the judgment of acquittal was not upon the record, and the only question was on the construction of the permit, a verdict was entered for the defendant. This case, therefore, has not determined, that an acquittal in the

(1) 5 T. R. 255., and see a case in 12 Vin. Ab. (A. b. 22.) pl. 1. cor. Price B. acc.

Exche-

Exchequer would be conclusive evidence of the illegality of a seizure, although certainly that appears to have been the opinion of Lord Kenyon. It may be observed, that an acquittal does not, like a conviction, ascertain any precise fact. The sentence might have proceeded on the ground, that sufficient evidence was not produced, on the part of the crown, to warrant the seizure; and, though the sentence may be conclusive as against the crown, it seems reasonable, that it should not have such a conclusive operation, in an action for seizing the property, against a third person, who was not a party with the crown in the original proceedings, and had no notice or opportunity for supporting the condemnation.

Sect. IV.

Of Sentences by Members of a College, Convictions before Magistrates, &c.

The principle, which has been before laid down as applicable to the sentences of courts of justice, seems to apply equally to the judicial proceedings of other tribunals, which are invested with an exclusive or peculiar jurisdiction.

Sentence of expulsion by a college.

A sentence of deprivation or expulsion of one of the members of a college, by the master and fellows, or by the visitor on an appeal, upon a subject within their jurisdiction, is conclusive in courts of law. And the justice of their decision cannot be questioned even in the King's Bench, though it belongs to that court to controul them, if they exceed the bounds of their jurisdiction. On this principle, a mandamus, to restore the fellow of a college, has been frequently refused (1). In the case of Philips v. Bury, it was decided, on an appeal to the House of Lords, that a sentence of deprivation, by the visitor of a college,

(1) Dr. Widrington's case, 1 Lev. 23. Dr. Patrick's case, 1 Lev. 65. Case of New College, 2 Lev. 14.

was conclusive evidence in an action of ejectment for one of the college estates; and the judgment of the court of King's Bench, which had been given on the opinions of three judges against the opinion of Lord Holt, was reversed (1). And in the last case on this subject, which was a prosecution for an assault in turning out of a college one who had been expelled, the court of King's Bench determined, that evidence, to impeach the sentence of expulsion, had been properly rejected at the trial. (2)

Convictions by magistrates.

A conviction by a justice of the peace, who has competent jurisdiction, is, till reversed or quashed, conclusive evidence in favour of the justice, in an action against him for false imprisonment. Thus in the case of Strickland against Ward (3), tried before Mr. Just. Yates, (which was an action of trespass and false imprisonment against the defendant, a justice of the peace,) the defendant produced in evidence, under the general issue (4), a warrant signed by him, reciting a conviction of the plaintiff for unlawfully returning to a parish, whence he had been removed, and requiring the keeper of a house of correction to keep the plaintiff to hard labour; he also produced the conviction, referred to in the warrant, regularly drawn up: Mr. Just. Aston, upon this, gave his opinion, "that the conviction could not be controverted in evidence, but that, as the justice had a competent jurisdiction of the matter, his judgment was conclusive, till reversed or quashed; and that it could not be set aside at nisi prius." The plaintiff was accordingly nonsuited. But where the magistrate has committed to prison, not having any jurisdiction, he will be liable to an action for false imprisonment, though the conviction has not been reversed or quashed (5); as, where the plaintiff was convicted and

(1) Philips v. Bury, Skin. 447. 1 Ld. Raym. 5. S. C.
(2) R. v. Grundon, Cowp. 315.
(3) At Winchester sum. ass. 1767, from a MS. note in 7 T. R. 633. 14 East, 75. 16 East, 21.
(4) St. 7 Jac. 1. c. 5.
(5) Hill v. Bateman, 2 Str. 710. Crepps v. Durden, Cowp. 640. Morgan v. Hughes, 2 T. R. 225.

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committed to prison for destroying game, though, as it was proved, he had effects which might have been distrained, sufficient to answer the penalty, (the statute of 5 & 6 Ann. c. 14. enacting that the penalty is to be levied by distress and sale of the offender's goods, and, *for want of distress*, the offender to be committed to the house of correction) (1); or, where the justice has committed to prison, on mere suspicion, without any information laid before him. (2)

It is reported to have been held (3), that, where actions for false imprisonment are brought against justices of peace, they are obliged to shew the regularity of their convictions; and that the informations laid before them, upon which their convictions are founded, must be produced and proved in court. But it appears from later authorities (4), that, in such collateral proceedings, the informality of the warrant of commitment, or of the conviction, cannot be taken advantage of by the plaintiff; and that, if the magistrate was warranted in taking cognizance of the charge, and did in fact convict, this will be sufficient to protect him, however irregularly the conviction may have been drawn up (5). It may also be collected from the late case of Gray v. Cookson (6), that, if the magistrate had a general jurisdiction over the subject-matter, evidence of facts not stated in the conviction is not admissible, to prove that the conclusion drawn by the magistrate was erroneous.

It is a general rule, with respect to special and limited jurisdictions, that where a person acts as judge, (that is, where he has over the subject-matter a general jurisdiction, which he has not exceeded,) he will not be liable to have his judgment examined in an action brought against him.

(1) 2 Str. 710.
(2) 2 T. R. 225.
(3) Hill v. Bateman, cor. Raymond C. J., 2 Str. 710.
(4) Massey v. Johnson, 12 East, 67. And see Gray v. Cookson and Clayton, 16 East, 13.
(5) Where a conviction has been quashed, the magistrate is protected in certain cases, by st. 43 G. 3. c. 141.
(6) 16 East, 21. 23. See also 7 T. R. 633. n.

him (1). When therefore in pursuance of such judicial authority he has convicted a party, the facts, upon which the conviction is grounded, cannot be traversed (2). So where a statute provides, that the judgment of commissioners, appointed by the act, shall be final, their decision is conclusive, and cannot be questioned in any collateral proceeding. It has therefore been held, that a certificate from commissioners for settling the debts of the army, stating that so much was due from the defendant (an army-agent) to the plaintiff (an officer), was conclusive in an action brought to recover the money; and that no evidence could be received to shew, that the commissioners had formed a wrong judgment. (3)

(1) Marshalsea case, 10 Rep. 76. Dr. Groenvelt v. Dr. Burwell, 1 Ld. Ray. 454. 467; 1 Salk. 396. S. C. Miller v. Seare, 2 Black. Rep. 1145. See also Ackerley v. Dr. Parkinson and Mawdesley, Hil. term 1815.

(2) 1 Ld. Ray. 467.

(3) Moody v. Thurston, 1 Str. 481. ruled by Pratt C. J.; and a new trial afterwards refused by the whole court. See also Lane v. Hegberg, Bull. N. P. 19; Earl of Radnor v. Reeve, 2 Bos. & Pull. 391.

CHAP. IV.

Of certain other judicial Proceedings.

WE proceed now to treat of the admissibility of certain other judicial proceedings; and, in the present chapter it is proposed to consider the admissibility of proceedings in Chancery, of depositions, inquisitions, examinations taken under acts of parliament, judgments of inferior courts, and, lastly, of awards.

SECT. I.

Of Proceedings in Chancery.

Decree. A DECREE in the Court of Chancery may be given in evidence on the same footing, and under the same limita-

tions, as the verdict or judgment of a court of common law. (1)

The common opinion used to be, that a bill in Chancery, which had been followed up by other proceedings, was admissible in evidence, as an admission of facts, against the complainant (2). "The allegations in the bill, it was said, must be supposed to be true: nor is it to be presumed, that the bill was preferred by a counsel or solicitor, without the privity of the party himself (2)." However, it is notorious that many of the facts stated in the bill are the mere suggestions of counsel, made for the purpose of extorting an answer from the defendant. The general rule therefore is, that a bill in Chancery will not be evidence, except to shew that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce the answer or the depositions of witnesses (3); it is not to be admitted as evidence, in courts of law, to prove any facts either alleged or denied in the bill (4). Lord Kenyon, indeed, is reported to have admitted a bill in Chancery, filed by an ancestor, to be evidence of a pedigree there stated, as a declaration in the family (5). But it was resolved by the judges in the Banbury peerage case, on a question put to them by the House of Lords, that a bill in equity, or depositions, cannot be received in evidence in the courts below, on the trial of an action of ejectment, against a party not claiming or deriving in any manner under the plaintiff or defendant in the Chancery suit, either as evidence of the facts therein deposed to, or as declarations respecting pedigree (6). And even if the bill or depositions could be received, some extrinsic proof must be given of the relationship between the complainant and the party whose pedigree Bill.

(1) See ante, p. 223.
(2) Snow v. Philips, 1 Sid. 221; Gilb. Ev. 42. Woollet v. Roberts, 1 Chan. Cas. 64. contra.
(3) Lord Ferrers v. Shirley, Fitzgib. 196. Bull. N. P. 235. Bowerman v. Sybourn, 7 T. R. 3. 1 Wightw. 325.
(4) Banbury Peerage case, reported from MS. in 2 Selw. N. P. 685.
(5) Taylor v. Cole, sitt. after Hil. term 1799, 7 T. R. 3. n.
(6) MS. case, in 2 Selw. N. P. 685; Feb. 1809. See also Berkeley Peerage case, suprà, p. 178.

is disputed. It would not be sufficient, that the bill purports to have been filed by a relation. In the Banbury peerage case before mentioned, where C D's legitimacy was in question, the claimant offered in evidence a bill filed in C D's name by E F his uncle and next friend, stating his legitimacy, but there was no proof that E F was his uncle: the judges, being referred to for their opinion, were unanimous, that extrinsic proof of the relationship was essential, and the bill, which was above 150 years old, was accordingly rejected. (1)

Answer. Answers in Chancery are confessions on oath, and therefore strong evidence against the party, that makes them. But when an answer is read, all the parts must be taken together, connected, and entire. If only a part is read in evidence, the other party is entitled to have the whole read (2); and if, on exceptions being taken, a second answer is put in, the defendant may insist upon having that also read, to explain what he swore in his first answer (3). This is the general rule, when an answer of either party to the suit is given in evidence against him, to prove a point in issue. But if an answer is produced, merely for the purpose of shewing the incompetency of a witness, who has in his answer admitted himself interested in the event of the cause, that part only is to be read which states the ground of interest (4); for if the witness is incompetent, his evidence ought not to be received in any form; on the other hand, if he is competent, he ought to be examined vivâ voce in open court.

When you read the answer of a party, says Ch. B. Gilbert, the confession must be all taken together: you shall not take only what makes against him, and leave out what

(1) MS. case in 2 Selw. N.P. 685; Feb. 1809. See also Berkeley Peerage case, suprà, p. 178.

(2) Per Holt C. J. Lynche v Clarke, 3 Salk. 153. Earl of Bath v. Battersea, 5 Mod. 9.

(3) R. v. Carr, 1 Sid. 418. Bull. N. P. 237. See ante, p. 79.

(4) Sparin v. Drax, trial at bar, Bull. N. P. 238.

makes

makes for him; for the answer is read as the sense of the party (1). But, although the defendant may regularly insist on having the whole of the answer read, that, by comparing the several parts with each other, the true meaning and extent of the admissions may be more clearly understood, it will not therefore follow, that all the parts of his statement are equally credible, or that every thing, which he asserts, is to be admitted, as strictly proved. If, for example, he states a fact, not from his own knowledge, but on mere report, that would not be evidence in his favour; as, on the other hand, it would not be evidence against him, in case he had acknowledged the report to be different. The objection is, not that he speaks in his own behalf, for that difficulty is waived by the other party, who offers the answer in evidence, but, that he speaks from hearsay, and has not the means of knowledge, which alone can be resorted to. In the case of Roe on demise of Pellatt and Others against Ferrars (2), where the defendant gave in evidence an answer by the lessors of the plaintiff, Mr. Justice Chambre, observing upon the degree of positive proof, which the lessors of the plaintiff had drawn from the answer in their own favour, expressed himself thus, "It is true, that the answer was introduced into the cause by the defendant, in whose behalf some parts of it were read. But, in those parts, on which the lessors of the plaintiff relied, they speak only to what "they have heard as truth." I think that was not admissible evidence, for it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answers, and that he does not thereby admit, as evidence, all the facts, which may happen to have been stated by way of hearsay only, in the course of the answer to a bill filed for discovery. This point, he added, does not indeed appear to have been con-

(1) Gilb. Ev. 44. See ante, p. 79. (2) 2 Bos. & Pull. 542. 548.

tested

tested at the trial. Had it been contested, I should have thought the court bound to send the case down for a new trial."

An answer in a court of equity is evidence against the party, who made it, and against all persons claiming under him. Thus, an answer to a bill filed in the Court of Exchequer, on a claim of tithe hay, by a vicar against the rector and others (occupiers of lands in the parish), will be evidence, in an action by a succeeding rector, for not setting out the tithe, against the defendant who claims under one of those occupiers: and it is equally admissible in evidence, although a decree is not shewn to have been made in the suit (1). Proof of an examined copy will be sufficient proof of the answer. (2)

The answer of a minor by his guardian is not evidence against him (3); because, in reality, it is the guardian's answer. The guardian is sworn, not the minor, who possibly may know nothing of its contents. And therefore an answer, purporting to be the answer of a minor by his mother and guardian, may be read against the mother, in another cause, where she is defendant in her own capacity (4). The answer of one defendant, generally speaking, is not evidence against a co-defendant (5); for, if that were allowed, a plaintiff might make one of his friends a defendant, for the purpose of procuring an answer in his favour against the co-defendant, who would have no opportunity of cross-examination. As an admission by one of two partners, concerning joint contracts during the partnership, is good evidence to charge the other partner, in an action against him alone (6): so, in an action by a creditor against

(1) Lady Dartmouth v. Roberts, 16 East, 334.

(2) Ib.

(3) Eccleston v. Petty, Carth. 79. 3 P. Wms, 237. Gilb. Ev. 44.

(4) Beasley v. Magrath, 2 Schoale and Lefroy's Rep. 34.

(5) Wych v. Meal, 3 P. Wms. 311. 12 Ves. jun. 361.

(6) Wood and Others, Assignees of Hussey and Others, v. Braddick, 1 Taunt. Rep. 104. See ante, p. 73.

some

some of the partnership firm, the answer of another partner to a bill filed by other creditors, has been received in evidence against the defendants, not indeed to prove the partnership, but, that being established, as an admission against those who are as one person with him in interest. (1)

It does not appear to have been expressly determined, whether an answer by a married woman can be used as evidence against her in an action after the husband's death. In the case of Wrottesley against Bendish and his wife (2), (where it was argued, that the wife was not bound to answer, on the ground, that the answer could not be read against her husband, nor against herself, as she is supposed to be under the control of the husband, and not to answer freely), the Lord Chancellor said, "he would not give any opinion, whether the answer may be read against the wife, when discovert; but as, in all times heretofore, the wife as well as the husband had been compelled to answer, he would not overthrow what had been the constant practice."

Depositions in a suit in Chancery, which are the written examinations of witnesses taken by officers of the court or by commissioners specially appointed for the purpose, may be given in evidence in an action at common law, on the same matter, between the same parties, or between any who claim under them, if it can be proved, at the time of the trial, that the deponent is dead (3); or, that he cannot be found after strict inquiry (4); or, that he has been subpœna'd and is unable to attend from sickness (5); or, if it can be proved, that he has been kept away by the contriv- Depositions.

(1) Grant v. Jackson and Others, Peake N. P. C. 203. See Lucas v De La Cour, 1 Maule & Selw. 250.; also p. 73, suprà.

(2) 3 P. Wms. 237.

(3) Godb. p. 193. pl. 276. & p. 326. pl. 418. Fry v. Wood, 1 Atk. Rep. 445. Coker v. Farewell, 2 P. Wms. 563. Gilb. Ev. 54. Bull. N. P. 239.

(4) See cases in (3). Benson v. Olive, cor. Reynolds C. B. 2 Str. 920.

(5) Luttrel v. Reynel and Others, 1 Mod. 283. Adm. per cur. in Kinsman v. Crooke, trial at bar, 2 Ld. Ray. 1166. 1 Atk. 445. Gilb. Ev. 54. Bull. N. P. 239. 1 Ves. & Beam. 22. 340.

ance

ance of the other party (1); or, that he is out of the kingdom, or not amenable to the process of the court (2). In either of these cases, depositions are admissible in evidence. But if the witness himself is in a state to be produced, his depositions cannot be received. The party who wishes to have the benefit of his testimony, ought, if he is able, to bring him forward, that he may undergo an open examination, in the face of the public, before the jury and the court: a mode of inquiry, generally more conducive than any other to the discovery of truth.

When a witness has been examined on interrogatories, and afterwards by accident becomes interested in the thing in question, the court of Chancery has allowed his depositions to be read for him, as evidence in his own suit, on a bill of revivor (3). "This," said Lord Hardwicke, "has been allowed on just reason; because his evidence must be taken, as it stood at the time of his examination, which should not be set aside, unless it could be supplied by other evidence (4)." But a different rule has been established in courts of common law. It was resolved in Tilly's case by the unanimous opinions of the courts of King's Bench and Common Pleas, that a party to an action of ejectment could not give in evidence his own depositions, though he had made them at a time when he was perfectly disinterested. (5)

Depositions are not to be admitted in evidence for a party to the suit, against a stranger, who was not a party, nor claims under either of the parties (6); nor can they be

(1) Bull. N. P. 243.

(2) 1 Atk. Rep. 445. Lord Altham v. Earl of Anglesey, tr. at bar in K. B., Gilb. Eq. Cas. 16. 18.

(3) Goss v. Tracy, 2 Vern. 699. 1 P. Wms. 287. S. C. Haws v. Hand, 2 Atk. 615.

(4) In Glyn v. Bank of England, 2 Ves. 42.

(5) Tilly's case, 1 Salk. 286. See also Holcroft v. Smith, Eq. Cas. Ab. 224; Baker v. Lord Fairfax, 1 Str. 101; Bull. N. P. 242.

(6) Hob. Rep. 155. 2 Roll. Ab. 679. pl. 8. 1 Vern. 413, Coke v. Fountain.

used

used by a stranger against one of the parties (1). An exception has been sometimes made in cases where the question is on the existence of a custom or on the right to tolls, or where hearsay and reputation would be good evidence (2); and it has been said, that in such cases depositions may be admitted, though the parties in the two suits are not the same. But, after the opinions expressed by some of the judges in the Berkeley peerage case, respecting depositions in a question of pedigree, there is reason to doubt, whether such evidence would now be considered admissible. (3)

When a bill has been dismissed, the rule respecting the admissibility of the depositions has been laid down with the following distinction. If the bill was dismissed, because the court considered the matter to be unfit for equity to decree, the depositions may still be given in evidence, provided the subject-matter of the suit was regularly before the court, and within its jurisdiction (4). But if the suit in equity be dismissed for the irregularity of the complainant, the depositions in that cause cannot be read in any fresh suit. Thus, where a devisee brings a bill of revivor, on a suit commenced by his devisor, and depositions are taken, and then the cause on the hearing is dismissed, because a devisee, claiming as a purchaser and not by representation, cannot bring a bill of revivor, the devisee will not be allowed, on exhibiting a new original bill, to use the former depositions; for, in the first cause, in which the complainant mistook his remedy, there was no complaint regularly before the court, and consequently there could not regularly be any depositions (5). For the same reason, such depositions would not be admitted as evidence, in a fresh suit at law.

(1) Rushworth v. Countess of Pembroke and Currier, Hardr. 472. Gilb. Ev. 55. See ante, p. 231. 233.

(2) Bull. N. P. 239. See ante, p. 233.

(3) See ante, p. 179, 180. and see Banbury Peerage case, ante, p. 263.

(4) Smith v. Veale, 1 Ld. Ray. 735.

(5) Backhouse v. Middleton and Others, Chan. Cas. 175. Gilb. Ev. 56. Smith v. Veale, 1 Ld. Ray. 735.

If the witness after being examined de bene esse should die before the defendant puts in his answer, his deposition cannot be read (1), because the opposite party had not the power of cross-examination; and the rule of common law is strict, that no evidence shall be admitted, but what is or might have been under the examination of both parties. "In such a case," says Ch. B. Gilbert (2), "the course is to move the court of Chancery, that the deposition of the deceased witness should be read; and, if the court see cause, they will order it, and this order will bind the parties to assent to the reading of such depositions, though it does not bind the court of nisi prius." It is the common practice in the court of Chancery, when an issue or trial at law is directed, to make an order that the depositions of witnesses shall be read in evidence, if it be satisfactorily proved at the time of the trial, that they are unable to attend in person (3). But this order is not made, for the purpose of making that admissible in evidence, which is not strictly admissible in courts of common law, but for the convenience of the parties. For if depositions are offered at the trial without such an order, the whole record, bill, answer, &c. must be proved; but, if there is an order for reading the depositions, the court of law will read them without going through the regular and strict course, which is generally necessary for the purpose of making them evidence. (4)

The reason why depositions are not read in evidence, before the defendant has put in his answer, has been before mentioned to be, because it does not otherwise appear that the adverse party had liberty to cross-examine. This reason will not apply, where the defendant is in contempt for refusing to answer. If the adverse party, says Ch. B. Gilbert, had been in contempt, then the depositions of

(1) —— v. Browne, Hardr. 315. Dutton v. Colt, Sir T. Ray. 335. n. Ford v. Guy, cited in Howard v. Tremaine, 1 Show. 363. Piercy v. ——, 2 Ion. 165. Bull. N. P. 240.

(2) Gilb. Ev. 57, 58. Bull. N. P. 240. And see Masden v. Bound, 1 Vern. 331.

(3) Corbet v. Corbet, 1 Ves. & Beam. 340.

(4) Palmer v. Ld. Aylesbury, 15 Ves. jun. 176.

the witnesses shall be admitted, for then it is the fault of the objector that he did not cross-examine the witnesses, since he would not join the examination. (1)

There has been, however, some difference of opinion on this subject. It is said to have been held in one case (2), that if witnesses are examined de bene esse before answer, upon a contempt, such depositions cannot be made use of in any other court, but in that court only, where they are taken. The reason, adds the reporter, seems to be because there was no issue joined, so as there could be a legal examination; and they were only taken to be read in the court in which they were taken, upon a contempt to that particular court. In another case, the case of Howard v. Tremaine (3), which was an action of ejectment by a devisee against an heir at law, a question was reserved for the opinion of the court of King's Bench, whether depositions could be given in evidence for the plaintiff under the following circumstances: a bill having been exhibited in Chancery by the plaintiff to perpetuate testimony, the defendant stood in contempt and would not answer; upon which the plaintiff had a commission, and examined witnesses to the matter of his bill de bene esse, and the defendant joined in the commission, and cross-examined some of the witnesses produced for the plaintiff, and, before the answer came in, the witnesses died. After an argument on the point, Lord Holt, according to the report in Shower, said, "Quære, if any court by course of law can examine witnesses till issue be joined, and therefore I much doubt, if these depositions can be evidence. We cannot take notice of what the Chancery allows as evidence, and their practice is no rule to us." Dolben J. also doubted. But Gregory J. thought the depositions good evidence, as the defendant had joined in the commission, and cross-examined. And Eyre J., ac-

(1) Gilb. Ev. 56.
(2) Watt's case, Hardr. 331.
(3) 1 Show. 363. 1 Salk. 278. S. C. Carth. 265. S. C.

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cording to the report in Salkeld, was clearly of opinion, that they ought to be admitted. "It would be very inconvenient," he said, "if such evidence were not allowed. For the heir at law will not answer the plaintiff's bill, and will not call in question the title of the devisee, as long as the devisee has witnesses alive to prove the will; but as soon as they are dead, he will commence his suit." The report in Shower adds, that in consequence of the doubt expressed by Lord Holt, the case was adjourned. But in Carthew's report of the same case, it is stated, that, "after much debate, the Court was of the same opinion, that the depositions might be given in evidence; otherwise, a bill in equity to perpetuate the testimony of witnesses would be to very little or no purpose."

This subject came before the court of King's Bench in the late case of Cazenove v. Vaughan (1); from which it now appears to be clearly settled, that depositions are not allowed to be read in evidence, before answer put in, or before the party is in contempt, unless he has had an opportunity of cross-examining; but if he has had such an opportunity, and has omitted to avail himself of it, he cannot afterwards make that a ground for objecting to the depositions as evidence.

Sect. II.

Of Depositions, Examinations, Inquisitions, &c. &c.

Depositions by consent.

Depositions are frequently taken with the consent of the parties to a suit, when a material witness is about to leave the kingdom, or resides abroad (2). And these depositions may be given in evidence, if at the time of the trial the witness has quitted the country (3). But if the trial comes on before his departure, or after his return,

(1) 1 Maule & Sel. 4.
(2) See ante, p. 10.
(3) Anon. case, 2 Salk. 691. Falconer v. Hanson, 1 Campb. 172.

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the depositions cannot be read. This rule, however, is not to be taken so strictly, as to make it absolutely necessary, that a witness, who is about to go abroad, should be on his voyage, when the trial comes on. If the ship has sailed, though it may have put back, or if the witness be on board, and the ship ready to sail, though prevented by contrary winds, that seems to be sufficient. (1)

Depositions in India

Where an indictment or information is exhibited in the King's Bench for an offence committed in India, or where a suit has been commenced in any court in this country for a cause of action arising in India (2), the depositions of witnesses may be obtained under the provisions of the statute 13 G. 3. c. 63. ss. 40. & 44 This statute enacts, that the Court may award a writ of mandamus to the judges of the courts in India, as the case may require, for the examination of witnesses, who are to be examined publicly in the court upon oath, administered according to the form of their several religions; and these depositions, duly taken and returned, in the form prescribed by the act, are to be allowed and deemed as good and competent evidence, as if the witness had been sworn at the trial, and examined vivâ voce.

Depositions before commissioners of bankrupt.

The depositions of witnesses, taken by commissioners of bankrupt, could not formerly be given in evidence, in an action to try the question of bankruptcy or any other question connected with it, because in these proceedings the parties interested had not the power of cross-examining the witnesses (3). But now, by the statute 5 G. 2. c. 30. s. 41. "Upon petition of any person to the great seal, praying that the commission and the depositions taken thereon, or any part of such depositions, and any other matter or thing relating to the commission, or the proceedings thereon,

(1) Fonsick v Agar, 6 Esp. N. P. C. 92.

(2) Francisco v. Gilmore, 1 Bos. & Pull. 177.

(3) 2 Roll Ab. 679. pl. 9. Bull. N. P. 242.

on, may be entered of record, the great seal may direct them to be entered of record; and in case of the death of the witnesses proving the bankruptcy, or in case the commission, depositions, proceedings, or other matters or things, be lost or mislaid, a true copy of the record of such commission, depositions, and proceedings, or other matters or things, signed and attested as therein mentioned, may upon all occasions be given in evidence to prove such commission and the bankruptcy of such person, against whom the commission issued, or other matters or things."

These depositions, when recorded, are evidence in an action at law, to prove the precise time, when the act of bankruptcy was committed (1); for the witness cannot tell his story before the commissioners, without saying when the act of bankruptcy was committed. He must mention that naturally and of course, and therefore is the more likely to speak the truth. In many cases, its being an act of bankruptcy depends on the time. The legislature considered the commissioners as indifferent persons, examining the witnesses with impartiality, and taking care of the interests of all parties. (2)

By statute 49 G. 3. c. 121. s. 10., in all actions brought by or against assignees, the commission and the proceedings of the commissioners are to be received as evidence of the petitioning creditor's debt, and of the trading and bankruptcy, unless the other party in the action, if defendant, at or before the time of pleading to the action, and if plaintiff, before issue joined, give notice in writing to such assignee, that he intends to dispute the same. And by section 11. of the same act, in all suits in equity by or against assignees, the commission and proceedings are to be received as evidence of the petitioning creditor's debt, and of the trading and bankruptcy, against all the

(1) Janson v. Wilson, 1 Doug. 257. (2) Per Ld. Mansfield, ib.

other

other parties in the suit, unless such parties, some or one of them, within ten days after rejoinder in the cause, give notice in writing to the assignees, that they intend to dispute the same. This statute applies only to those cases, where the assignees are parties to the action. In an action between third persons, if the validity of a commission of bankruptcy comes incidentally into question, as a ground of defence, it must be regularly proved, as it would have been before the passing of the statute (1). But the statute is not confined to cases where the assignees are named as such upon the record; and will apply, where the opposite party knows, that they make out their title under the commission (2). When the proceedings are offered in evidence, it will be sufficient to prove that they came out of the proper custody, (namely, that of the solicitor to the commission,) or to prove the hand-writing of one of the commissioners, before whom they were taken (3). Such evidence is necessary, although there has not been any notice of an intention to dispute their validity.

The words of the statute are, that "the commission and the proceedings of the commissioners are to be received *as evidence* of, &c., unless the other party give notice in writing, that he intends to dispute the same." The proceedings are therefore *primâ facie* evidence; but not conclusive. The bankrupt, in an action against the assignees, may call witnesses to contradict the depositions respecting the petitioning creditor's debt, the trading, or the bankruptcy, although he has not given such a notice to the assignees. (4)

In an action of assumpsit for a creditor's share, under an order of commissioners of bankrupt for a dividend, the

(1) Doe dem. Mawson v. Liston, 4 Taunt. 741.

(2) Simmonds v. Knight, 3 Camp. 251.

(3) Collinson v. Hillear, 3 Campb. 30.

(4) Ellis v. Shirley, 3 Campb. 424

proceedings of the commissioners are conclusive evidence of the debt, against the bankrupt's assignees (1): where the debt has been once liquidated before the commissioners, it cannot be litigated, except on an application to the great seal. But on an indictment for perjury, charged to have been committed by the defendant in passing his examination before the commissioners, strict evidence of the bankruptcy seems to be necessary, and the commission and proceedings under it will not be sufficient proof; for the authority of the commissioners in taking the examination is grounded, not in the commission, but in the bankruptcy. (2)

Depositions before justice of peace.

Justices of the peace are enabled and directed to take the depositions of witnesses in cases of felony, by the statutes 1 & 2 Ph. & M. c. 13. s. 4., and 2 & 3 Ph. & M. c. 10. (3). By the first of these statutes, "justices of the peace, when any person is brought before them for manslaughter or felony, being bailable by law, shall, before any bailment, take the examination of the prisoner, and the examination of them who bring him, of the fact and circumstances thereof, and the same, or as much as may be material to prove the felony, shall put in writing, before they make the bailment; which examination, with the bailment, the said justices shall certify at the next general gaol delivery to be holden within the limits of their commission."

As this statute extended only to bailable felonies, and not to cases where the justice committed a prisoner on suspicion of manslaughter or felony, (in which cases, however, the examination of the prisoner, and of those who brought him before the magistrate, was more necessary, than where the prisoner was bailed,) it was therefore enacted by statute 2 & 3 Ph. & M. c. 10., "that the justice, before he shall

(1) Brown v. Bullen, 1 Doug. 407.
(2) R. v. Punshon, 3 Campb. 96.
(3) 1 Hal. P. C. 305. 585. 2 Hal. P. C. 52. Tong's case, Kel. 19. Paine's case, 1 Salk. 281. Woodcock's case, 2 Leach Cr. Cases. 565.

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commit a prisoner, brought before him on suspicion of manslaughter or felony, shall take the examination of the prisoner, and the information of those who bring him, of the fact and circumstance thereof, and shall put the same, or as much thereof as shall be material to prove the felony, in writing, within two days after the said examination, and the same shall certify in such form and at such time as they ought to do, if such prisoner so committed had been bailed."

In the construction of these statutes, it seems now to be settled (1), that the depositions of a witness, taken upon oath (2), in the presence of a prisoner (3) who has been brought before the magistrate on a charge of felony, may be given in evidence on the trial of an indictment for the same felony, if it be proved on oath to the satisfaction of the Court, that the informant is dead (4), or not able to travel (5), or that he is kept away by the means and contrivance of the prisoner (6); provided also, that the depositions offered in evidence are proved to be the same, as were sworn before the justice, without any alteration (7). Before the statute of Philip and Mary, a deposition taken before a justice of the county, where a felony was committed, would not have been evidence, even though the witness had died or was unable to travel. (8)

It is not essential to the validity of depositions, that they should be signed by the deceased witness. In Flemming's case, on an indictment for a rape, all the judges concurred

(1) See Hawk. Pl. Cr. b. 2. c. 46. s. 15.

(2) 1 Hal. P. C. 305. 586. 2 Hal. P. C. 52. 120. 284. Dalton. Just. c. 111. p. 369. Bull. N. 242.

(3) R. v. Payne, 5 Mod. 163. cited per Ld. Kenyon, 3 T. R. 723. Woodcock's case, 2 Leach Cr. C. 566. R. v. Vipont, 2 Burr. 1163.

(4) 4th res. in Ld. Morley's case, Kel. 55. Bromwich's case, 1 Lev. 180. Dalt. c. 111. p. 369. Adm. per Cur. in Payne's case, 1 Salk. 281. Hal. P. C. ib. Bull. N. P. 242. Case of Flemming and Windham, 2 Leach Cr. C. 996. Westbeer's case, 1 Leach Cr. C. 14. (in which case the depositions were those of a deceased accomplice).

(5) 1 Hal. P. C. 305. 586. 2 Hal. P. C. 52. Kel. 55 (the case of depositions before a coroner).

(6) Kel. 55. Foster, Disc. p. 337.

(7) 1 Hal. P. C. 305. 2 Hal. P. C. 52. Kel. 55.

(8) 3 T. R. 710. 722.

in opinion that the depositions of a girl deceased, on whose person the crime had been committed, taken on oath by the committing magistrate, had been properly admitted in evidence at the trial, though the depositions were not signed by the deceased. (1)

The information of witnesses, taken before justices of the peace, cannot be given in evidence on an indictment for a misdemeanor, (as, on an information for publishing a libel,) or in civil actions, or on an appeal for murder (2). Nor can a conviction for petty treason be grounded on such evidence (3); for the statute 1 Ed. 6. c. 12. s. 22. enacts, "that no person shall be indicted, arraigned, condemned, or convicted, for any offence of treason or petty treason, unless he be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same;" and this is confirmed by statute 5 & 6 Ed. 6. c. 11. s. 12., which enacts, "that no person shall be indicted, arraigned, condemned, convicted, or attainted, for any of the treasons specified in the act, or for any other treasons, unless the offender be accused by two lawful accusers; which said accusers at the time of the arraignment of the party accused shall be brought in person before the party so accused, and avow and maintain what they have to say against the said party, to prove him guilty of the treasons or offences contained in the bill of indictment laid against the party arraigned; unless the said party arraigned shall willingly without violence confess the same." However, as a prisoner may be convicted of murder, on an indictment for petty treason, the depositions are admissible in evidence to support a conviction of murder, though not sufficient to support a conviction of petty treason. (4)

The words of the statute 1 & 2 Ph. & M. c. 13. s. 4., which are also referred to and adopted by stat. 2 & 3 Ph. & M. c. 10.,

(1) Case of Flemming and Windham, 2 Leach Cr. C. 996.

(2) R. v. Payne, 1 Ld. Ray. 729.

(3) Foster Disc. 337.

(4) Radbourne's case, 2 Leach Cr. C. 512. Swan's case, Foster Disc. 106.

M. c. 10., are, "that the justices shall certify the examination taken before them at the next general gaol delivery within the limits of their commission." It often happens that the felon is taken and examined by a magistrate in a county, where the offence was not committed; in such a case, the examinations and informations are to be transmitted into the county, where the felon is indicted, and may there be read in evidence against him, though the magistrate had not original cognizance of the offence. (1)

As informations, when judicially and regularly taken, are evidence against a prisoner, if the informant dies before the trial; so, on the other hand, where the informant himself gives evidence, the informations may be used, on the part of the prisoner, to contradict his testimony. One of the objects of the legislature in passing the statutes, was to enable the judge and jury, before whom the prisoner is tried, to see whether the witnesses at the trial are consistent with the account given by them before the committing magistrate (2). Thus, it was admitted in Lord Stafford's case (3), that the depositions of a witness, taken before a justice of peace, might be read, at the desire of the prisoner, in order to take off the credit of the witness, by shewing a variance between the depositions and the evidence given in court vivâ voce. (3)

The statute 1 & 2 Ph. & M. c. 13. s. 5. enacts, "that every coroner upon an inquisition before him found, whereby any person shall be indicted for murder or manslaughter, or as accessary before the murder, shall put in writing the effect of the evidence given to the jury before him, being material; and shall certify the same evidence, together with the inquisition or indictment before him taken and found, at or before the time of the trial thereof to be had." Depositions before a coroner.

(1) Dalt. Just. c. 111. p. 369. 2 Hal. P. C. 285.

(2) See the judgment in Lambe's case, 2 Leach Cr. C. 633.

(3) 3 St. Tr. p. 131. Hawk. Pl. C. b. 2. c. 46. s. 22.

On this statute, it has been resolved unanimously by all the judges, that in case any of the witnesses, who have been examined before the coroner, are dead, or unable to travel, or kept out of the way by the means and contrivance of the prisoner, their depositions may be read on the trial of the prisoner, the coroner first proving, that they are the same which he took upon oath, without any addition or alteration (1). And proof, that the witness has been inquired after and is not to be found, has been thought sufficient to authorize the reading of the depositions (2). The statute requires the coroner "to put in writing the *effect* of the evidence given to the jury before him, being material;" the true meaning of which appears to be, that he should at least take down the plain and obvious meaning of the words spoken by the witnesses, and not merely to state what, in his judgment, was the result of the evidence.

It does not appear from the report of either of the cases above cited, whether the depositions were taken by the coroner in the presence of the prisoner. But it seems to be the prevailing opinion, that they are admissible, though the prisoner may have been absent at the time of taking the inquisition. A book of authority (3), after stating the general rule, that depositions are not evidence, where there cannot be a cross-examination, adds, by way of exception, "yet, if the witnesses examined on a coroner's inquest be dead or beyond sea, their depositions may be read; for the coroner is an officer appointed on behalf of the public, to make inquiry about the matters within his jurisdiction." And in the case of the King against the Inhabitants of Eriswell (4), (where Mr. Just. Buller, in support of his opinion on the case then before the court, stated, that depositions before a coroner had been long settled to be good evidence, though the person accused be not present when they are

(1) Lord Morley's case, Kel. 55. Thatcher's case, 2 Jon. 53. Bromwich's case, 1 Lev. 180. Gilb. Ev. 124. See ante, p. 277.

(2) Adm. per Cur. in Harrison's case, cor. Holt C. J., Atkins J., and Nevil J., 4 St. Tr. 496. Contrà, 4th res. in Ld. Morley's case, Kel. 55.

(3) Bull. N. P. 242.

(4) 3 T. R. 713.

taken,

taken, nor ever heard of them till the moment, when they are produced against him,) Lord Kenyon, who differed from Mr. Justice Buller on the principal question, said (1), that the case, alluded to, was an exception founded on the statute of Philip and Mary. Besides, he added, the examination before the coroner is an inquest of office; it is a transaction of notoriety, to which every person has a right of access; and writs of ad quod damnum have been frequently set aside, for want of this notoriety in the execution of them by the sheriff. To this effect also Lord Hale lays it down (2), that the coroner's inquest must hear evidence on oath as well for the party accused as for the king, if it be offered to them; because the proceeding is not so much an accusation on an indictment, as an inquisition of office to inquire truly, how the party came to his death; and for an omission in this respect, an inquisition of felo de se has been quashed.

Inquisition.

An inquisition of felo de se, taken before the coroner super visum corporis, is considered by Lord Coke (3) to be conclusive evidence of the fact, against the executors or administrators of the deceased. But Lord Hale in his Pleas of the Crown (4) is of a different opinion, conceiving it unreasonable, that they should be concluded, and lose the goods of the deceased without an answer, by an inquisition, which may be taken by the coroner behind their backs. And it is now settled that such an inquisition may be removed into the King's Bench, and traversed by the executors and administrators of the deceased. (5)

If it be found by the coroner's inquisition, in case of the death of a person who is not felo de se, that the person, who committed the offence, fled for it, the authorities hold this finding to be conclusive and not traversable; yet, upon

(1) 3 T. R. 722.
(2) 1 Pl. Cr. 415. 2 Pl. Cr. 60. Scorey's case, 1 Leach Cr. C. 50.
(3) 3 Inst. 55.
(4) 1 Pl. Cr. 416. 1 East, P. C. 389.
(5) See 1 Saund. 362. note 1. by the Editor, who has there collected the cases on this subject. As to the duty of the coroner in taking an inquest, see stat. 1 H. 8. c. 8.

prin-

principle, it should seem as if the one case were as much traversable as the other. (1)

There are various other kinds of inquisition of office, which, if regularly taken, and under a competent authority, will be admitted by courts of law as evidence of the facts there found. Some inquisitions are taken on an inquiry made by the sheriff, or coroner, or escheater, by virtue of their office, or under a writ directed to them for that purpose: others are taken by commissioners, specially appointed to examine witnesses on oath, and inquire into the several matters specified.

An inquisition of lunacy is evidence on the trial of an indictment, to shew that the prisoner was insane, when he committed the offence (2). Such inquisitions are evidence even against third persons, who were strangers to the proceeding. Thus, in a case, where an inquisition of lunacy was offered as evidence to affect the rights of third persons, and objected against as res inter alios acta, Lord Hardwicke overruled the objection, and said that inquisitions of lunacy, and likewise other inquisitions, as post mortem, &c., are always admitted to be read, but not conclusive (3). So an inquisition taken by virtue of a commission which issued in the reign of Queen Elizabeth, under the seal of the court of Exchequer, to commissioners to inquire, whether a prior was seised of certain lands as parcel of a manor, or whether the crown was seised of them after the dissolution of the priory, was adjudged to be good evidence of those facts (4). And an inquisition, taken under an order of the House of Commons, is evidence respecting the fees of certain offices. (5)

(1) See n. (5), ante, 281, and Hawk. b. 2. c. 9. s. 54.

(2) R. v. Bowler, O. B. June 1812, before Le Blanc J. and the present Ch. J. of the Common Pleas, MS.

(3) Sergeson v. Sealey, 2 Atk. 412. Faulder v. Silk and Another, 3 Campb. 126. See Jones v. White, ante, p. 239.

(4) Tooker v. D. of Beaufort, 1 Burr. 146.

(5) Green v. Hewett, Peake N.P.C. 184.

Inqui-

Inquisitions, which are extrajudicial or irregularly taken, will not be received in evidence. Thus an inquisition made by a sheriff's jury, for the purpose of ascertaining, who was entitled to the property of goods taken under an execution, is not admissible evidence even against the sheriff, in an action of trover brought by the party, in whose favour the inquisition was found (1). This evidence was received at the trial of the cause by Mr. Justice Buller, who admitted it, but held it not to be conclusive; and, a verdict having been found for the defendants, a motion was afterwards made for a new trial, on the ground, that the inquisition was conclusive evidence in favour of the plaintiff, as against the person who contested the property with the plaintiff, and who was present at the time of taking the inquisition. But the court refused the application. Ch. J. Eyre said, he doubted whether a sheriff can, strictly speaking, hold any inquisition as to property, except under a writ de proprietate probandâ in replevin. And Mr. Justice Buller said, he thought he ought not to have admitted the evidence at the trial, as the inquisition was not under the king's writ, but merely a proceeding by the sheriff of his own authority.

In order to make an inquisition evidence, the commission, under which it was taken, ought regularly to be proved, or shewn to be lost. But in cases of more general concern, such as the minister's return to the commission in the reign of Hen. 8. for inquiring into the value of livings, a copy of the whole record need not be taken, and the commission is of such public notoriety as not to require any proof. (2)

The general rule, respecting the admissibility of depositions after the death of the witness, is, that they are not evidence, unless they have been taken judicially, and unless Examinations.

(1) Latkow v. Eamer and Burnett, Sheriff of Middlesex, 2 H. Black. 437.

(2) Bull. N. P. 228. Hardcastle v. Sclater, 2 Gwill. 787.

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the party, whose interests would be affected by them, had an opportunity of being present and cross-examining the deponent. It is therefore now clearly established, that the ex parte examination of a pauper concerning his settlement, taken on oath before magistrates, is not admissible, upon a question of settlement, as evidence against the appellant parish (1). The objection against their admissibility is, not, that the magistrates have no power to administer an oath, (for it seems to be admitted, that the statute 13 & 14 C. 2. c. 12. s. 1., which first gave them a power to remove, gave them also incidentally a power to examine the pauper preparatory to a removal (2),) but, that the examination is ex parte, obtained at the instance of overseers, whose parish would be benefited by the removal, and behind the backs of the appellants, who received no notice of the proceeding, and had not the benefit of a cross-examination. (3)

There are some exceptions to the general rule, besides those already mentioned, founded on the special provisions of acts of parliament. Thus, the examination of a single woman before a magistrate, under the statute 6 G. 2. c. 31., (which enacts, that, in case any single woman shall, in an examination to be taken in writing upon oath before any justice, &c., charge any person with having gotten her with child, it may be lawful for the justice to issue his warrant for the immediate apprehension of such person, &c.,) will be evidence after the woman's death against the reputed father, on his appearance at the sessions to abide the order of the court according to his recognizance. This examination, taken by the directions of the statute, in a judicial proceeding, will be evidence like depositions under the statute of Philip and Mary (4); although the proceeding

(1) R. v. Nuneham Courtenay, 1 East, 373. R. v. Ferry Frystone, 2 East, 54. R. v. Abergwilly, ib. 63.

(2) Per Ld. Kenyon, R. v. Eriswell, 3 T. R. 721.

(3) Per Ld. Kenyon, R. v. Eriswell, 3 T. R. 725.

(4) R. v. Ravenstone, 5 T. R. 373.

before

before the magistrate is entirely ex parte, and though the party accused is not present at the woman's examination.

The examination of a soldier before a magistrate, touching his settlement, is made evidence on an appeal, by the mutiny act (1), which enables "two or more justices for the county, where any soldier shall be quartered, in case he has either wife or child, to cause him to be summoned before them in the place, where he is quartered, in order to make oath of the place of his last legal settlement. And such justices are required to give an attested copy of such affidavit to the person making the same, to be by him delivered to his commanding officer, in order to be produced when required, which attested copy shall be at any time admitted in evidence as to such last legal settlement at any general quarter sessions of the peace." As an attested copy is thus made evidence, it has been determined, on a reasonable and obvious construction of the act, that the original affidavit, which is a higher kind of evidence, ought to be admitted as well as the copy (2). The statute however is to be construed strictly; and therefore no other attested copy is legal evidence, while the original is in existence, except that given to the soldier (3). For the same reason, it should seem, if the soldier, who has been examined before the magistrates, be abroad, or dead, or has quitted the army, at the time when the appeal is tried, the original affidavit or an attested copy would not be admissible in evidence. "One inconvenience, intended to be remedied by the act, was that of taking a soldier out of the quarters, for the purpose of his being examined respecting his settlement; and in order to guard against this inconvenience, the act directs the magistrates, who take the soldier's examination, to give him a copy of it, to be delivered to the commanding officer; that copy is lodged in the hands of the commanding officer, that it may be afterwards produced when required. But if

(1) Sect. 33.
(2) R. v. Wailey, 6 T. R. 534.
(3) R. v. Clayton-le-Moors, 5 T. R. 706.

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the soldier go abroad, the same inconvenience is not likely to happen, and the act of parliament does not apply to such a case." (1)

Depositions in ecclesiastical courts.

Depositions taken in an ecclesiastical court, in a cause within its jurisdiction, seem to be admissible in evidence upon the same footing as depositions in the court of Chancery, the parties being the same, and having had an opportunity of cross-examining the deponents. Chief Baron Gilbert lays down the rule thus (2); "Depositions taken in the spiritual court in a cause relating to *lands* cannot be read, because they are no oaths at all, inasmuch as the spiritual courts have no authority to take depositions relating to lands: but it seems they may be read, when taken in a cause in which they have authority, as far as relates to that cause, inasmuch as these are lawful oaths, and a man may be indicted for the violation of them, though they be not oaths in a court of record." It does not appear, in any of the cases above mentioned, to have been thought essential to the admissibility of depositions, that they should be made in courts of record; but the material consideration was, whether they were taken judicially, and whether the other party, against whom they were offered in evidence, had any opportunity of cross-examining the deponent. And upon this principle, Lord Holt, in the case of Breedon v. Gill (3), was of opinion, that depositions before commissioners of excise, (who by statute 12 C. 2. c. 24. s. 45. have a power to administer oaths on inquiring into forfeitures,) taken in the presence of the other party, and signed by the witness, would be admissible on an appeal from the sentence of the commissioners, in case the witness should be dead at the time of hearing the appeal. There are some authorities, which hold, that depositions of witnesses in an ecclesiastical court are not to be admitted in courts of common law (4);

(1) Per Lawrence J. in R. v. Clayton-le-Moors, 5 T.R. 708.
(2) Gilb. Ev. 60.
(3) 1 Ld. Ray. 219. 222.
(4) Earl of Sarum v. Sir B. Spencer, 2 Roll. Abr. 679. pl. 5. Lit. Rep. 167. March. Rep. 120.

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and one book of authority lays it down as a general rule, that depositions, taken in a court not of record, shall not be allowed in evidence elsewhere (1). However, the better opinion seems to be, that such depositions are admissible in evidence, under the limitations above stated.

Judgments of inferior courts.

Judgments in a court baron, county court, or hundred court, and the judgments of any other inferior court recognized by the law of the land (2), are evidence between the same parties, upon the same points in issue, on matters within their jurisdiction. Thus, in an action of debt on a judgment recovered in an inferior court, the judgment will be evidence of the debt, but not conclusive; and the defendant may shew that the cause of action was not within the jurisdiction of the court below. (3)

Award.

An award, regularly made by an arbitrator, to whom matters in difference are referred, is conclusive, in an action at law, on the parties to the reference, upon all matters within the submission. What has been before said on the subject of judgments by a court of concurrent jurisdiction may be said also of awards, that they are, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter directly in question (4). Thus, in an action of ejectment, where the lessor of the plaintiff and the defendant had before referred to an arbitrator their respective claims to the property in question, the court of King's Bench held, that the party had by his agreement concluded himself from disputing the lessor's title (5). It has been before observed, that an award is not a bar to any cause of action, which the one party had against the other at the time of the reference, if it appear that the subject-matter

(1) Bul. N. R. 242. See ante, p. 222.

(2) Com. Dig. "Evidence," C. 1.

(3) Herbert v. Cook, reported in note (a) Willes Rep. 36. See Moses v. Macferlan, ante, p. 225.

(4) See ante, p. 223; and Campbell v. Twemlow, ante, p. 70; and R. v. Cotton, ante, p. 179.

(5) Doe dem. Morris v. Rosser, 3 East, 15.

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of the action was not inquired into before the arbitrator. (1)

The certificate of a vice-consul has been compared to a foreign judgment. But the vice-consul is not, properly speaking, a judicial officer; nor is his certificate to be admitted as evidence of the fact there stated. In the case of Waldron v. Coombe (2), the court of Common Pleas determined, that the certificate of a British vice-consul in a foreign country could not be received here as evidence of the amount of a sale, although by the law of that country he was constituted general agent for all absent owners of goods, and was authorized and compelled to make the sale in question.

(1) Ravee v Farmer, 4 T. R. 146. ante, p. 235, 6.

(2) 3 Taunt. 162.

CHAP. V.

Of the Proof of Records, and judicial Proceedings.

RECORDS are, for security, preserved in public repositories, and, as they cannot be removed from place to place to serve a private purpose, examined copies are admitted as the best producible evidence. (3)

Acts of parliaments.

The printed statute-books have been at all times admitted as evidence of public acts of parliament. And by the statute 41 G. 3. c. 90. s. 9., made for the better and more effectual proof of the statute law, it is enacted, that copies of the statutes of Great Britain and Ireland prior to the Union, printed by the printer duly authorized, shall be received as conclusive evidence of the several statutes in the courts of either kingdom.

(3) Leighton v. Leighton, 1 Str. 210.

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A different rule has been adopted with respect to private acts of parliament. The regular proof of these is by an examined copy, compared with the original in the Parliament-office at Westminster. But to prevent the inconvenience of such a strict proof, a special clause is now usually inserted, providing that the act shall be deemed public; in which case, the copy printed by the king's printer will be sufficient evidence of its contents. (1)

Records of courts, and copies of.

Copies of records in courts of justice are of two kinds; under seal, and not under seal. Those under seal are called Exemplifications, and are of higher credit than any sworn copy; for "the courts of justice, that put their seal to the copy, are supposed more capable than a common person to examine, and more exact and critical in their examination (2)." These exemplifications are of two kinds; under the great seal in Chancery, or under the seal of some other court. (3)

1. The practice is not to exemplify a record under the great seal, unless it be either a record of the court of Chancery, or be sent from some other court into Chancery, the centre of all courts, by writ of certiorari. But in either of these cases a copy may be obtained, under the attestation of the great seal. (4)

If the record of a court is put in issue by a proceeding in the same court, the record itself is inspected by the judges. But when the record, denied by the issue, is in a court of superior or concurrent jurisdiction, the trial is then by the tenor of the record, which may be obtained by certiorari and mittimus out of Chancery (5), a method adopted for the purpose of communicating evidence of records from one superior court to another, without the inconvenience

(1) See ante, p. 220.
(2) Gilb. Ev. 11, 12.
(3) Gilb. Ev. 12.
(4) 3 Inst. 173. Gilb. Ev. 12. Bull. N. P. 226.
(5) Luttrel v. Lea, Cro. Car 297. Pitt v. Knight, 1 Saund. 98. Hewson v. Brown, 2 Burr. 1034.

of removing the originals. If the record of an inferior court is disputed in a suit before a higher tribunal, the certiorari may be issued out of a superior court, as well as from the court of Chancery (1). And in pursuance of this writ, where the superior court sends for the record of an inferior court, not for the purpose of seeing whether their proceedings are within the limits of their jurisdiction, but merely to know whether there be in fact such a record, it will be sufficient to certify the tenor (that is, a literal transcript,) of the record (2). But where the record itself is the subject of the proceedings in the superior court, the original ought to be returned. (3)

When records are exemplified, the whole, in general, must be exemplified, for the construction is to be taken from a view of the whole together: and nothing but records can be proved by an exemplification. Private deeds, exemplified under the broad seal, will not be admitted in evidence; for as the deeds themselves are in the custody of the party, they ought to be produced, that the court may see, whether there are any erasures or interlineations. (4)

2. The second sort of copies under seal are exemplifications of the records of a court under its own seal; and they also are considered to be of higher credit than sworn copies. The seal of the king, and of the public courts of justice, and of all courts established here by act of parliament, are admitted in evidence without extrinsic proof of their genuineness; as, for example, the seal of the county palatine of Chester (5), or of the great sessions of Wales (6), or the seal of the ecclesiastical court on an exemplification of a will (7). But the seals of private courts, or of a fo-

(1) Butcher and Aldworth's case, Cro. Eliz. 821. Guilliam v. Hardy, 1 Ld. Ray. 216.

(2) Woodcraft v. Kinaston, 2 Atk. 317.

(3) Ib.

(4) Bull. N P. 227.

(5) Dyer, 276. cited per Cur. in Olive v. Gwin, 2 Sid. 146.

(6) S. Hardr. 113. S. C. Gilb. Ev. 16.

(7) Kempton dem. Boyfield v. Cross, Rep. temp Hard. 108.

reign

reign colonial court (1), or of a corporate body (2), ought to be proved by a witness acquainted with their impression. It is not, however, necessary to prove the seal of a corporation in the same manner as the seal of an individual, that is, by producing a witness, who saw the seal affixed to the identical instrument; but when an instrument purports to be under the seal of a corporation, it will be sufficient to shew that the seal is the official seal of the corporate body. (3)

3. Copies of records, not under seal, are also of two kinds; sworn copies, and office copies.

Records are complete, as soon as they are delivered into court in parchment, and there fixed as the rolls of the court. Of these, a sworn copy will be sufficient evidence for a jury, unless the record itself is in issue. But the copy of a judgment signed by the master is not evidence, though upon such judgment execution may be taken out; for it is not yet become permanent, and is removable from place to place. (4)

Copies of records are to be proved as other transcripts, by a witness, who has compared the copy, line for line, with the original, or who has examined the copy, while another person read the original (5). But when an ancient record has been lost, a copy may be read without proving it a true copy. Thus an unexamined copy of a recovery of lands in ancient demesne has been received, where the original was lost, and where possession had gone for a long time according to the recovery (6). And similar proof has been allowed of the decree in the time of Henry

(1) Henry v. Adey, 3 East, [illegible]

(2) Moises v. Thornton, 8 T. R. 307.

(3) 8 T. R. 307. In Woodmass v Mason, 1 Esp. N. P C. 53., it was held by Lord Kenyon, that the seal of the city of London proves itself.

(4) Bull. N. P. 228.

(5) Reid v. Margison, on a rule to shew cause, in the Exchequer, 1 Campb 470. Rolf v. Dart, 2 Taunt. 52. M'Niel v. Perchard, 1 Esp. N. P. C. 263, cor. Lord Kenyon. Gyles v. Hill, 1 Campb. 471. n. cor. Lawrence J.

(6) Anonym. case, Ventr. 257.

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the Eighth for tithe in London, that decree having been lost (1). In such cases, says Ch. B. Gilbert, the instrument must be, according to the rule of the civil law, vetustate temporis aut judiciariâ cognitione roboratum. (2)

It is a general rule, that a copy, authenticated by a person appointed for that purpose, is good evidence of the contents of the original, without any proof of its being an examined copy. The chirograph of a fine, for example, is evidence of the fine, the chirographer being appointed to give out copies of the agreements between the parties, which are entered of record (3). So an indorsement by the proper officer on a deed of bargain and sale, enrolled according to the form of the statute 27 H. 8. c. 16., is evidence of the enrolment (4). A rule of court under the hand of the proper officer is itself an original, and may be given in evidence in a legal proceeding in that court, without being proved a true copy (5). So, in a case where a witness, being about to leave the country, had been examined at a judge's chambers, a copy of his depositions, delivered out by the clerk of the judge, and attested by the clerk's signature, was admitted in evidence, without proof of its being examined and compared with the original depositions (6). But where the officer of the court is not entrusted to make out a copy, and has no more authority than any common person, the copy must be regularly proved in the strict and regular mode. Thus the office copies of depositions, though they are evidence in the court of Chancery, where officers are entrusted for that purpose, will not be admitted in courts of common law, without examination with the roll (7). So, where a fine is to be proved with proclamations, as it must be to bar a stranger, the proclamations ought to be examined with the roll;

(1) Ventr. 257. Knight v. Dauler, Hardr. 323. Thurston v. Slatford, 1 Salk. 284, per Holt C. J.

(2) Gilb. Ev. 19.

(3) Gilb. Ev. 21.

(4) Per Buller J. in Kinnersley v. Orpe, 1 Doug. 56.

(5) Selby v. Harris, 1 Ld. Ray. 745.

(6) Duncan v. Scott, 1 Campb. 101.

(7) Gilb. Ev. 21.

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for though the chirographer is authorized to make out copies of the fine itself, he is not appointed to copy the proclamations. (1)

Verdicts.

A verdict will not be admitted in evidence, without also producing a copy of the judgment founded upon it. The production of the postea alone is not sufficient; for it may happen that the judgment was arrested, or a new trial granted (2). But this rule will not apply to the case of a verdict on an issue directed out of Chancery, as it is not usual to enter up judgment in such a case; and here, therefore, the decree of the court must be shewn, which will be a sufficient proof, that the verdict was satisfactory, and stands in force (3). And though the nisi prius record, with the postea indorsed, is not evidence of the verdict, it is good and proper evidence that the cause came on to be tried (4). In the case, just cited, of Fisher v. Kitchingman, Willes C. J. doubted whether the associate was the proper person to produce the postea in evidence; because, by several rules of court, it ought to be returned into court to the proper officer within the four first days of the next term; but, on the prothonotaries informing the Court, that scarely one postea in a hundred was so returned, he was of opinion, that this objection was not of sufficient weight to set aside the verdict.

Writs.

When a writ is only inducement to the action, the fact of taking out the writ may be proved without a copy, because possibly the writ might not have been returned, and then it is not a record. But where the writ itself is the gist of the action, there ought to be a copy from the record, as the best proof of which the nature of the case is capable. (5)

(1) Gilb. Ev. 21. Allen's case, Bull. N. P. 229. 3 Taunt. 166.
(2) Bull. N. P. 234. Fisher v. Kitchingham, Willes Rep. 367.
(3) Montgomerie v. Clarke, at the Delegates, 1745, Bull. N. P. 234.
(4) Pitton v. Walter, 1 Str. 161., cor. Pratt C. J. Fisher v. Kitchingham, Willes Rep. 368.
(5) Gilb. Ev. 34. Bull. N. P. 234.

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If an action of trespass, for taking goods in execution, is brought by the party, against whom the writ of fieri facias issued, it will be sufficient for the officer to give the writ in evidence, without shewing a copy of the judgment. But if the plaintiff is not the party, against whom the suit issued, and claims the goods by a prior execution or sale, the officer, in order to prove the sale or the execution fraudulent, must produce not only the writ, but also a copy of the judgment. In the first case, he will justify himself, by proving that he took the goods in obedience to a writ issued against the plaintiff; but, in the other case, the goods do not primâ facie belong to the party against whom the writ issued, and therefore the officer is not justified by the writ in taking them, unless he can bring the case within the statute 13 Eliz. c. 5. (against fraudulent alienations, &c.) for which purpose it will be necessary to shew a judgment. (1)

The return of the sheriff upon a writ, which has been duly returned and filed, is *primâ facie* evidence of the fact there stated, when that fact comes incidentally into question. If the sheriff return a rescue, the court above, to which the return was made, would give it such credit, as to issue an attachment in the first instance; though, upon an indictment for a rescue, the defendant might shew, that the return was false (2). And so, in an action for maliciously suing out an alias fieri facias, after a sufficient execution under the first fieri facias, the Court of King's Bench held, that the sheriff's return annexed to the writs, (in which he stated, that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the plaintiff,) had been properly admitted at the trial as evidence of that fact, in support of a plea of licence pleaded by the defendant; for, as the Court said, faith ought to be given to the official act of

(1) Lake v. Billers, 1 Ld. Ray. 733. Martin v. Podger, 2 Black. Rep. 701.

(2) R. v. Elkins, 4 Burr. 2129.

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a public officer, like the sheriff, even where third persons are concerned. (1)

It is enacted by statute 14 G. 2. c. 20. s. 4., (made for the purpose of protecting purchasers in cases, where recoveries have not been entered on record,) that where any person has purchased any estate, whereof a recovery was necessary to be suffered in order to complete the title, such person and all claiming under him, having been in possession of the purchased estate from the time of the purchase, may after the end of twenty years produce in evidence the deed making a tenant to the writ of entry, or other writ for suffering a common recovery and declaring the uses, and the deed so produced (execution thereof being duly proved) shall in all courts be deemed good and sufficient evidence for the purchaser, and all claiming under him, that the recovery was duly suffered and perfected according to the purport of the deed, in case the record of recovery cannot be found, or should not appear to be regularly entered. **Common recoveries.**

A decree in the court of Chancery may be proved by an exemplification under the seal of the court; or, by a sworn copy; or, by a decretal order in paper, with proof of the bill and answer (2). But it has been held, that the bill and answer need not be proved, if they are recited in the decretal order (3). And it is said in a book of authority (4), "that, if a party wants to avail himself of the decree only, and not of the answer, the decree, under the seal of the court and enrolled, may be given in evidence, without producing the bill and answer, and the opposite party will be at liberty to shew, that the point in issue was not the same as the present issue." However, the rule, generally laid down, seems to be, that, where a party intends to avail **Proceedings in Chancery.**

(1) Gyfford v. Woodgate, 11 East, 297.

(2) Trowel v. Castle, 1 Keb. 21. Com. Dig. Ev. (C. 1.), p. 94.

(3) Per Trevor C. J. in Wheeler v. Lowth, cited Com. Dig. ib. 1 Keb. 21, contrà.

(4) Bull. N. P. 235. citing Ld. Thanet v. Patterson, K. B. East. 12 G. 2.

himself of the contents of a decree, and not merely to prove an extrinsic collateral fact, (as, that a decree was made by the court,) he ought regularly to give in evidence the proceedings upon which the decree is founded. "The whole record," says Ch. B. Comyns, "which concerns the matter in question, ought to be produced (1)." So, "a sentence in the admiralty court, may be evidence, upon the libel and answer produced; and a judgment in a court baron, or other inferior court, with proof of the proceedings in which the judgment was given (2)." If, indeed, the fact to be shewn were merely, that a decree has been made in the court of Chancery, or that a decree, made there, has been reversed on appeal, proof of the previous proceedings will not be necessary. (3)

An answer cannot be regularly given in evidence without proof of the bill; for without the bill there does not appear to be a cause depending. But if there be proof by the proper officer, that the bill has been searched for in the office and cannot be found, the answer has been allowed to be read without a sight of the bill (4). As the defence in Chancery is upon oath, it will be presumed in ordinary cases, that the answer was sworn to by the defendant. And when an answer is offered in evidence as an admission of the party upon oath, it will be sufficiently proved by an examined copy; nor will it be necessary to shew, that there has been any decree in the suit (5). But stricter proof is required on a prosecution for perjury alleged to have been committed by the defendant in his answer. Some evidence of the administration of the oath will there be required; as, that a person, calling himself by the defendant's name, was sworn, and that the signature on the answer (which must be produced) is his hand-writing; or, that the answer is signed by the defendant, and that the jurat, purporting to

(1) Com. Dig. tit. Evid. (A. 4.), p. 85.
(2) Com. Dig. ib. (C. 1.), p. 94.
(3) See Jones v. Randall, Cowp. 17.
(4) Gilb. Ev. 49.
(5) Lady Dartmouth v. Roberts, 16 East, 334.

have

have been sworn before a master, is attested by the master's hand-writing (1). This strictness of proof is required, not only in criminal proceedings, as on a trial for perjury, but also in actions which are in the nature of a criminal proceeding, as in an action for a malicious prosecution. (2)

With regard to depositions, the general rule is that they are not to be admitted in evidence without proof of the bill and answer (3); for, if there do not appear to be a cause depending, the depositions are considered to be mere voluntary affidavits; and the bill and answer ought to be produced, in order to shew, who were the parties to the suit, and what the points in issue, as depositions are evidence only upon the same points, and between the same parties, or those who claim under the parties. But if the defendant is in contempt, or has had an opportunity of cross-examining, which he chose to forego, the depositions may then be read, after proving the bill, although no answer has been put in. (4) Depositions.

As the practice formerly was not to enroll the bill and answer, ancient depositions may be given in evidence without them (5). And where the court of Chancery, on directing a trial at law, makes an order, that the depositions of a witness shall be read, the proof of the bill and answer will be dispensed with. This order is never made for the purpose of making that admissible in evidence, which is not strictly admissible in courts of common law (6); and the depositions cannot be admitted, even under the order, unless it be satisfactorily proved at the time of the trial, that

(1) R. v. Morris, 2 Burr. 1189. R. v. Benson, 2 Campb. 508.
(2) 16 East, 340.
(3) Gilb. Ev. 56. Bull. N. P. 240. Nightingale v. Devisme, 5 Burr. 2594. ad fin. Baker v. Sweet, Bunb. 91. Illingworth v. Leigh, 4 Gwill. 1619. At the trial of the last cited case, Mr. Just. Heath refused to admit depositions in evidence, because the bill and answer had not been duly proved, nor inquired after. But it is said by the reporter, that the rejection of this evidence was one of the grounds, upon which a new trial was afterwards granted.
(4) Cazenove and Another v. Vaughan, 1 Maule & Selw. p. 4. See ante, p. 272.
(5) Gilb. Ev. 58.
(6) See ante, p. 270.

the witnesses are unable to attend in person. If depositions were offered in evidence without such an order, the whole record, bill, answer, &c. must be regularly proved; but when there is an order for reading depositions, the court of law will read them, without going through the regular and strict course, which is generally necessary for the purpose of making them evidence. (1)

The proof of depositions is by an examined copy. Office copies are evidence in the court of Chancery, but not in courts of common law, for a reason before mentioned. (2)

Judgment in House of Lords.

Judgments in the House of Lords are not formally drawn up, but minutes only are entered on the journals. The minutes of a judgment are the judgment itself; and they may be proved by an examined copy. (3)

Proceedings in inferior courts.

When the judgment of a court baron, or of any other court of inferior jurisdiction, is offered in evidence, the proceedings on which it is founded ought to be shewn (4); but as the record is not usually made up in form, the minutes of their proceedings will be admitted (5), if they are perfect, and omit nothing material.

Probate of wills.

Testaments are proved in the ecclesiastical court either in common form, or in form of law. The first mode of proof is, where the executor presents the will before the judge, without citing the parties interested, and deposes that it is the true and last will of the testator; upon which, the judge allows the will. The proof in form of law is, when the will is exhibited before the judge in presence of the parties interested, and after a full examination is finally allowed (6). If the will be proved in common form, it may

(1) Palmer v. Ld. Aylesbury, 15 Ves. jun. 176. Corbett v. Corbett, 1 Ves. & Beam. 340.

(2) See ante, p. 292.

(3) Jones v. Randall, Cowp. 17.

(4) See ante, p. 296.

(5) Fisher v. Lane, 2 Black. Rep. 834. Per Holt C. J. in R. v. Hains, Comberb. 337.

(6) 3 Bac. Ab. 40. tit. Executor.

be disputed at any time within thirty years; but if it be proved in the more formal mode, and there be no proceedings within the time limited for appeals, the will cannot afterwards be disputed (1). After proof of the will, the original is deposited in the registry of the ordinary or metropolitan, and a copy in parchment is made out under his seal, and delivered to the executor, together with a certificate of its having been proved before him, which copy and certificate are the probate.

It is not the practice in the ecclesiastical courts to grant a second probate, if the first should be lost, but only to grant an exemplification from the record of the court, and this exemplification will be evidence of the proof of the will (2). And an examined copy of the probate is evidence of the person there named being executor, as the probate is an original taken by authority, and of a public nature (3); but a copy of the will would not be evidence of that fact. (4)

The probate of a will, devising real property, is not evidence of the contents, in an action of ejectment, even to prove a relationship; for where the original is in being, the copy is not admissible; and, besides, the seal of the court does not prove it a true copy, unless the suit relate only to personal property (5). But the ledger-book, says Mr. Just. Buller, is evidence in such a case, because this is not considered merely as a copy, but is a roll of the court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove relationship, the rolls of the spiritual court, which has authority to enrol wills, are sufficient proof of such testament. And, under particular circumstances, the ledger-book may be evidence even in a devise of a real estate; as where, in an avowry

(1) 3 Bac. Ab. 40. tit. Executor.

(2) Shepherd v. Shorthouse, 1 Str. 412. Bull. N. P. 246.

(3) Hoe v. Nelthorp, 3 Salk. 154; 1 Ld. Raym. 154. S. C. Per Holt C. J. in R. v. Haynes, Skin. 584. See ante, p. 245.

(4) Bull. N. P. 246.

(5) Ib.

for

for a rent-charge, the avowant could not produce the will under which he claimed, that belonging to the devisee of the land, the ordinary's register of the will, and proof of former payments, were held to be sufficient evidence against the plaintiff, who was devisee of the land charged. However, in such a case, notice ought to be given to the other party to produce the will. It has been often held, that a copy of the ledger-book is not evidence; yet, since the original would be read as a roll of the court without further attestation, it seems fit, says Mr. Justice Buller, that the copy should also be read. The contrary practice, he adds, has been founded upon the mistaken supposition, that the ledger-book is read as a copy, when in fact it is read as a roll of the court. (1)

To prove that the probate of a will has been revoked, an entry of the revocation in a book of the prerogative court, in which all causes were entered by the register, and which was kept as the only record of such proceedings and of the decree of the court, has been admitted to be good evidence. (2)

Letters of administration.

Administration is generally granted by writing under seal. It may also be granted by entry in the registry without letters under seal (3). The ecclesiastical court never grants an exemplification of letters of administration, but only a certificate, that administration was granted; therefore, when a lessee pleads an assignment of a term from an administrator, such certificate is good evidence (4). And the original book of acts, directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party, to whom administration of the intestate's effects is granted, without producing the letters of administration themselves, (notwithstanding subsequent letters of administration granted to another,) if the

(1) Bull N. P. 246.
(2) Ramsbottom's case, 1 Leach Cr. C. 30, n. (c).
(3) Vin. Ab. Executor, D. p. 70.
(4) Kempton dem. Boyfield v. Cross. Rep. temp. Hard. 108. Bull. N. P. 246.

first

first are not recalled; for, the original book was the authority for the proper officer to make out letters of administration, and the letters of administration were only the copy of the original minutes of the court, drawn up in a more formal manner (1). So an examined copy of the act-book, stating that administration was granted to the defendant at such a time, is proof of his being administrator in an action against him, without giving him notice to produce the letters of administration. (2)

In an action upon the judgment of a court of a foreign country, the sentence must be proved by proving the handwriting of the judge of the court, who subscribed it, and the authenticity of the seal affixed. Thus, in a late case (3), the plaintiff, who sued here on a judgment obtained in the island of Grenada, was nonsuited, because he could not prove the seal affixed to be the seal of the island. And on a motion to set aside the nonsuit, the court said, they could not take official notice, that the seal affixed was the seal of the island, which was necessary to be shewn, in order to prove the judgment, which it purported to authenticate; and that proving the judge's hand-writing could not advance the proof of the seal, unless by considering him in the nature of a witness to it, which was not pretended. Foreign judgment.

The effect of an award has been before mentioned (4). In an action upon an award, it will be necessary to prove both the submission and the execution of the award. And, in general, (whether the validity of the award comes into question directly, or only incidentally,) the submission of all the parties ought to be regularly proved. Thus, where there had been a deed of reference, between a creditor and several partners, of all copartnership accounts and of all matters in difference between the parties or any two of them, Award.

(1) Elden v. Keddell, 8 East, 187, 16 East, 209. Garrett v. Lister, 1 Lev. 25. Bull N. P. 246.

(2) Davis v. Williams, 13 East, 232. Ray v. Clark, ib. 238. n. (a).

(3) Henry v. Adey, 3 East, 221.

(4) See ante, p. 179. 287.

them, and an action of trover was afterwards brought by the creditor, the assignee under a commission of bankruptcy of one of the partners, (in which action the plaintiff produced the award and deed of reference, as evidence of a separate debt due to him from the bankrupt,) the court of King's Bench held, that it was indispensably necessary to prove the execution of the deed by all the parties; for this was a reference of the aggregate accounts between all and each of the partners, and the consideration to each for entering into the submission was, that each party's account should be liquidated, not only as to one, but as to all; the accession of all therefore ought to be proved; and, without such proof, the arbitrator would not appear to have competent authority to decide the whole question between the parties. (1)

(1) Autram v. Chace, 15 East, 209.

CHAP. VI.

On Public Writings, not judicial.

THE next species of evidence, which our subject leads us to consider, relates to such public writings as are not judicial. In treating of this part of the subject, it will only be necessary to mention some of the principal documents of this description; after which, we shall proceed to enquire, how a party, who wishes to use public writings in evidence, may obtain an inspection.

Domesday-book. The most ancient public document in the kingdom is Domesday-book, consisting of two volumes, kept in the receipt of the Exchequer. They contain a general survey of all the counties in England, excepting the four northern, and were compiled soon after the Conquest for the purpose of ascertaining the ancient demesne lands, which were the socage tenures first in the hands of Edward the Confessor, and

and afterwards of William the Conqueror. This has been always considered a book of the greatest authority; and if a question should at any time arise, whether a manor is ancient demesne, the trial is by inspection of Domesday-book (1). These volumes have of late years been printed at the expence of government, in consequence of an address from the House of Lords; and the work is said to be executed with the most scrupulous fidelity and correctness (2). Another ancient survey, which ascertains the extent of the king's ports, is also deposited in the Exchequer (3). These surveys are recognised and treated as authentic documents in courts of justice, having been made by the authority and order of the government of the country, on public occasions, and on subjects of public interest.

Surveys of ecclesiastical benefices.

The Valor Beneficiorum, or Pope Nicholas's Taxation, is another document of a public nature, and of great authority. In the year 1288, Pope Nicholas the Fourth, to whose predecessors in the see of Rome the first fruits and tenths of all ecclesiastical benefices had for a long time been paid, granted the tenths to King Edward the First for six years, towards defraying the expence of an expedition to the Holy Land; and, that they might be collected to their full value, a taxation by the king's precept was begun in that year, and finished for the province of Canterbury in the year 1291, or the 20th year of the reign of Edward the First; and for that of York in the following year; the whole being under the direction of the Bishops of Winton and Lincoln (4). This taxation of Pope Nicholas is a most important document, because all the taxes, as well those paid to our kings as those to the pope, were regulated by it, till the survey made in the twenty-sixth year of Henry VIII.; and because the statutes of colleges, which were founded before the Reformation, are also interpreted by

(1) Hob. 188. Gilb. Ev. 69.

(2) First Report of H. of Commons, on Public Records, Appx. A. 1. a.

(3) Gilb. Ev. 69.

(4) See First Report of H. of Commons on the Public Records, p. 15.

by this criterion, according to which their benefices under a certain value are exempted from the restriction in the statute of the twenty-first of Henry VIII. concerning pluralities (1). The original is kept in the office of the king's remembrancer in the Exchequer.

A new Valor Beneficiorum was instituted in the twenty-sixth year of Henry VIII., when the first fruits and tenths of every ecclesiastical promotion were annexed to the revenue of the crown (2). To ascertain their value, ecclesiastical surveys were taken, by virtue of commissions in the king's name issuing under the great seal (3); and these surveys are evidence of their amount at that period. Upon the same principle, surveys of the possessions of religious houses, previous to the dissolution of the monasteries, are received in evidence (4); and these surveys are admissible, although the commissions, under which they were taken, are not to be found. (5)

Surveys of the church and crown lands were taken by commissioners in the time of the commonwealth, under the authority of acts or ordinances of the parliament; and copies of these surveys were deposited in many of the cathedrals. The originals would have been good evidence of the particulars of the surveyed estates, upon the same principle as the other public surveys which have been before mentioned; but as they were destroyed at the time of the great fire in London, the copies have been admitted, as evidence, in the place of the original surveys, provided they have been kept in unsuspected repositories (6). The parliamentary surveys have the credit of being taken with extreme accuracy and minuteness. The circumstance, therefore, of

(1) Humphreys v. Knight, Cro. Car. 455. 2 Lutw. 1305. Stump v. Ayliffe, 2 Gwill. 536.

(2) St. 26 H. 8. c. 3.

(3) Sect. 3 & 10.

(4) Vicar of Kellington v. Trin. Coll. Cambridge, 1 Wils. 170.

(5) See (4), and Bagshaw v. Bp. of Bangor, cited in Underhill v. Durham, 2 Gwill. 542.

(6) Underhill v. Durham, 2 Gwill. 542.

these surveys being silent as to a supposed modus has been considered to be strong evidence against its existence. (1)

The Journals of the Lords or Commons are evidence of their proceedings. Thus, an entry in the Journals of the House of Lords, stating that a judgment below has been reversed, is evidence of the fact of reversal (2); and the Journals have been admitted to prove an address from the House of Lords to the King, and the answer of the King (3). But a resolution of either House is not evidence of the truth of facts there affirmed; and therefore in the case of Titus Oates, who was charged with having committed perjury on the trial of persons suspected of the popish plot, a resolution of parliament, asserting the existence of the plot, was not allowed to be evidence of that fact. (4) Journals of parliament.

The public acts of government, and acts by the king in his political capacity, are commonly announced in the Gazette, published by the authority of the crown; and of such acts announced to the public in the Gazette, the Gazette is admitted in courts of justice to be good evidence. Proclamations for a public peace, or for the performance of quarantine, and any acts done by or to the king in his regal character, may be proved in this manner (5); and, upon the same principle, articles of war purporting to be printed by the king's printer, are allowed to be evidence of such articles (6). In the last reported case on this subject, a Gazette, in which it was stated, that certain addresses had been presented to the king, was adjudged by the court of King's Bench to be proper evidence, to prove an averment of that fact in an information for a libel (7); for they are addresses, said Lord Kenyon, of different bodies of the king's subjects, received by the king in his public capacity, Gazettes

(1) 11 East, 284. 1 Maule & Selw. 294.

(2) Jones v. Randall, Cowp. 17.

(3) Franklin's case, 9 State Tr. 259, cited by Buller J. 5 T. R. 445.

(4) 4 State Tr. 39.

(5) 5 T. R. 436. 443.

(6) R. v. Withers, cited by Buller J. 5 T. R. 446.

(7) R. v. Holt, 5 T. R. 436.

and

and they thus become acts of state. Gazettes are not evidence of private titles or private interests, as of a presentation, or of a grant by the king to an individual, which have no reference to the affairs of government; nor is a Gazette evidence to prove an appointment to a commission in the army (1). The Gazette is not evidence, as public notice of a particular fact, more than any other newspaper; unless it is made such by act of parliament, as in the case of bankrupts. An advertisement, therefore, announcing a dissolution of partnership, would not of itself be evidence of that fact, so as to discharge one of the partners from debts subsequently contracted by the rest with a partnership-dealer; but there ought to be some further proof, as, that the dissolution was notorious in the neighbourhood. It is incumbent on persons dissolving a partnership, to send notice of such dissolution to all the persons, with whom they had dealings in partnership (2). However, with respect to such as had not any previous dealings with the partnership, such an advertisement is, of itself, without any additional proof, evidence for the jury, upon which they are to determine, whether it is probable, that the dealer knew of the dissolution. (3)

Parish registers.

Parish registers are evidence of births, marriages, and burials. The keeping of registers, for entries of births and christenings, commenced in the thirtieth year of the reign of Henry VIII., and was afterwards enforced by injunctions from Edward VI., and from Elizabeth (4); and the marriage act (5), after directing registers to be kept as public books in every parish, for the purpose of registering marriages, enacts, that "immediately after the celebration of every marriage, an entry thereof shall be made in such register; in which entry or register it shall be expressed, that the marriage was celebrated by banns or licence; and

(1) Kirwan v. Cockburn, 5 Esp. N. P. C. 233. R. v. Gardner, 2 Campb. 513.

(2) Graham v. Hope, Peake N. P. C. 154.

(3) Godfrey v. Macauley, Peake N. P. C. 155. n. 1 Esp. N. P. C. 371. S. C. Gorham v. Thompson, Peake N. P. C. 42.

(4) 3 Burn. Eccl. L. 275. Gilb. Ev. 68.

(5) St. 26 G. 2. c. 33. s. 14.

if

if both or either of the parties married by licence be under age, with consent of the parents or guardians, as the case shall be; and shall be signed by the minister with his proper addition, and also by the parties married, and attested by two credible witnesses." By the canons of 1603 (1), copies of parish registers in every diocese ought to be regularly transmitted once in every year to the diocesan or his chancellor; a regulation extremely important, for the purpose of guarding the evidences of title and pedigree, but which has been so generally neglected, as to make it necessary for the legislature to interpose, and pass an act for their better preservation. It is by this statute enacted (2), that copies of the register books, verified by the officiating minister of the parish, shall be transmitted annually by the churchwardens, after they or one of them shall have signed the same, to the registrars of the diocese within which the church is situated.

An entry of marriage in the parish register, made in the form prescribed by the act of parliament, is evidence, that the persons therein named were married, on the day specified, by banns or licence, as the case may be. Such an entry is not essential to the validity of a marriage; so that, if it has not been expressed in the regular form, the only consequence will be, that it cannot be admitted as evidence of the marriage, which must, therefore, be established by some other medium of proof. In order to prove, that the parties described in the register are the same parties, whose marriage is in question, it must obviously be unnecessary to call either of the subscribing witnesses to the register; any evidence, which satisfies the jury concerning their identity, must be sufficient; as, by proof of the similarity of their hand-writing, or that the bell-ringers were paid by them for ringing after the marriage, or by proof of other circumstances to ascertain the persons. (3)

(1) Can. 70. Gibson's Codex, p. 203.
(2) Stat. 52 G. 3. c. 146. s. 7.
(3) Bull. N. P. 27.

Registers of ships.

Public registers are required by act of parliament to be kept for the registering of ships (1); and the register and certificate of register are conclusive evidence of want of title, against those who are not named in the register. Thus, in an action on a policy of insurance on freight, where the interest in a ship and its earnings were alleged to be in four persons, who were partners in trade, two only of whom were named as owners in the register, it was decided, that the action could not be maintained, although it was proved as a fact, that the ship had been paid for by all the four partners: for as the plaintiffs claimed the freight only in right of ownership, they could not recover without proving that right; and it appeared conclusively from the register, that all the four partners had not a legal title to the ship (2). But although the documentary evidence furnished by the register-acts is in many cases the strongest proof of title, it is not the only evidence that may be produced. Thus in an action on a policy of insurance effected upon a ship, where it became a question, whether an allegation, of the property being in two persons, could be sustained upon the evidence given in the cause (3), Lord Ellenborough, in delivering the opinion of the court, said, "As to the first point made in this case on the part of the defendant, namely, that the ownership alleged was not sufficiently proved, it was proved by the captain in the ordinary way, that the owners, by whom, as such, he was appointed and employed, were the persons, in whom the ownership is by the declaration averred to be. And though it afterwards appeared by his answers on cross-examination, that the ownership was derived to those persons under a bill of sale, executed by himself, as attorney to the former owner, it did not on that account become necessary for the plaintiffs to produce that bill of sale, or the ship's register, or to give any further proof of such their property; the

(1) Stat. 26 G. 3. c. 60. Stat. 34 G. 3. c. 68.

(2) Camden v. Anderson, 5 T. R. 709.

(3) Robertson and Thompson v. French, 4 East, 130. 136.

mere

mere fact, of their possession as owners, being sufficient primâ facie evidence of ownership, without the aid of any documentary proof of title-deeds on the subject, until such further evidence should be rendered necessary in support of the primâ facie case of ownership which they made, in consequence of the adduction of some contrary proof on the other side. No such contrary proof was however in this case given on the part of the defendant."

The register of a ship, then, is conclusive evidence, that persons, who are not there named as owners, cannot legally be joint-owners; but the converse of the rule is not true, namely, that all persons, who are named as owners in the register, are liable as such. Such registers are not recognized as public documents to prove the ownership; and they are not evidence to fix the parties therein named as owners, in actions against them, unless they are shewn to have been made by their assent or recognized by them. This point was decided in the case of Tinkler v. Walpole (t); which was an action for goods sold and delivered for the use of a ship, against the defendant as one of the owners. At the trial of the cause, in order to prove the ownership of the defendant, two registers were offered in evidence, purporting to have been made on the oaths of the managing owner, who gave the order for the goods, and of two other part-owners, swearing that they and others named, including the defendant, were owners of the ship; and it was insisted that these registers, on account of their authenticity as public documents, required for public purposes, and obtained under the sanction of an oath, ought to be considered at least primâ facie evidence to prove the defendant a part-owner. But Lord Ellenborough C. J. who tried the cause, ruled that the evidence was not admissible, unless it could be shewn that the defendant had assented to the register, or at least had

(t) 14 East, 226. Cooper v. South and others, 4 Taunt. 802. Smith v. Fuge, 3 Campb. 456. Fraser v. Hopkins, 2 Taunt. 5.

recognized it. And this opinion was afterwards confirmed by the other judges of the court. On shewing cause against a rule nisi for a new trial, Lord Ellenborough expressed himself in the following terms: "Notwithstanding the practice may have prevailed for a long time to receive ships' registers, as evidence of the property being in the persons therein named, yet when we are brought to consider the admissibility of such evidence against the defendant, in a case, where he has done no act to adopt the register, as having been made by his authority, we cannot give effect to it, without saying that a party may have a burthensome charge thrown upon him by the act of a third person, without his own assent or privity. If it had appeared, that the defendant, by any act of his own, had recognized the register, he would have been liable to all the consequences as a part owner, which it describes him to be; but here he has done no act to adopt it. His partner has indeed dealt with the property, as if the defendant were a part-owner, by registering the ship in his name; but the act of a third person, without some act of the defendant to recognize it, cannot throw upon him a burthen, without violating the plain rule of law." Mr. Justice Bayley said: "Before the first register act passed, there must have been other media of proof to charge a party as owner of a ship; and the object of that act was not to create evidence to charge any person named as owner, but that no person should have the benefit of the British navigation, without registering his ship in the manner prescribed. It would be very unjust, in many cases, if a person could be charged, as a part-owner, with the expences of the ship, by having his name inserted in the register without his knowledge; it would often be converted into an engine of fraud; for if the owners were not in good circumstances, it would be easy to introduce another name of a solvent man into the register, in order to procure credit; and then, if that were evidence against him, he would be liable to be sued; and how could he be prepared to negative the evidence, if he knew nothing of the fact of such a register?

register? The other owners named would be made parties to the action, so that he could not call them to disprove the fact."

Upon the same principle, a register is not of itself evidence of a joint-ownership, in support of the defendants' plea, that other persons there named are jointly liable with him (1); nor is it evidence, that the ship is British-built, as there described (2). So, in an action brought by the plaintiff as agent, on a policy of insurance, the register is not evidence to prove an averment, that the interest in the ship is in the persons there described (3). The legislature has made the registration necessary to complete a title, but this does not make it, of itself, proof of the title. Property in a ship is to be proved now, as it was proved before the acts of parliament relating to registers; as for example, by proving actual possession in the party, or in those to whom he has committed it, or in those from whom he has himself derived his title. Any one of these media of proof, (accompanied by the evidence of the registry, in order to make the other evidence admissible,) will be sufficient. (4)

It is enacted by st. 17 G. 2. c. 38. s. 14., that true copies of all rates and assessments, made for the relief of the poor, be entered in a book to be provided for that purpose by the churchwardens and overseers of the poor of every parish, &c. who shall take care, that such copies be entered accordingly, within fourteen days after all appeals from such rates are determined, and shall attest the same by putting their names thereto; and every such book shall be carefully preserved by the churchwarden, &c. for the time being, or one of them, in some public place, in every such parish, &c. whereto all persons assessed or liable to be assessed may freely resort, and shall be delivered over from time to time to the new and succeeding church- Rate-books.

(1) Flower v. Young, 3 Campb. 2[illegible]
(2) Reusse v. Meyers, 3 Campb. 475.
(3) Pirie v. Anderson 4 Taunt. 652.
(4) Ib. p. 657.

wardens,

wardens, &c. as soon as they enter into their offices, and shall be produced by them at the general or quarter sessions, when any appeal is to be heard or determined.

Book for parish indentures.

The statute 42 G. 3. c. 46. enacts, that the overseers of the poor of every parish, shall provide and keep a book at the expence of the parish, and enter therein the name of every child, who shall be bound out by them respectively as an apprentice, together with the several other particulars, in the manner and form required by this act; and every such entry, shall be produced and laid before the two justices of the peace, who shall signify their assent to the indenture of apprenticeship, at the time when such indenture shall be laid before them for that purpose, and each entry shall, if approved of, be signed by them according to the prescribed form. And in the third section, it is enacted that any person may at all seasonable hours inspect such book in the hands of the said overseer, and take a copy of such entry; and every such book shall be deemed to be sufficient evidence in all courts of law in proof of the existance of such indentures, and also of the several particulars specified in the register respecting such indentures, in case it shall be proved to the satisfaction of the court, that the indentures are lost or destroyed.

Books in public offices, &c.

The register of the navy office has been admitted in evidence, to prove the death of a sailor (1); the book from the master's office in the Court of King's Bench, to prove a person one of the attornies of that court (2); and the log-book of a man of war, which convoyed a fleet, to prove the time of the convoy's sailing (3). Bank-books are good evidence to prove the transfer of stock (4); and on a prosecution for a libel published concerning a person in his

(1) Bull. N. P. 249. Rhodes's case, 1 Leach. Cr. C. 29. Wallace v Cook, 5 Esp. N. P. C. 117. See Barber v. Holmes, 3 Esp. N. P. C. 190.

(2) R. v. Crossley, 2 Esp. N. P. C. 524.

(3) D'Israeli v. Jowett, 1 Esp. N. P. C. 427.

(4) Breton v. Cope, Peake N P. C. 30. Marsh v. Colnet, 2 Esp. N. P. C. 665.

office

office of treasurer of a parish, an entry in a vestry-book, stating that he was elected at a vestry duly held in pursuance of notice, has been considered sufficient evidence to support an allegation in the indictment, that he was duly elected treasurer (1). So, in an action for disturbing the use of a pew in a church, an old entry in the vestry-book, stating that the pew had been repaired by the then owner of a messuage (under whom the plaintiff claimed,) has been admitted as evidence of his right; being made by the churchwardens on a subject within the scope of their official authority, and as shewing the reputation in the parish respecting the right (2). Upon the same principle, the day-book of a public prison, containing a narrative of the transactions of the prison, has been received as proof of the time of a prisoner's commitment or discharge (3): but it would not be admissible to prove the cause of his commitment (4). The distinction between these cases is, that, in the former, there was no document besides the one produced, and no other evidence of the fact in question could be given, except perhaps the parol testimony of some person, who might have happened to be in prison at the time; but in the last case, the committitur, from which the entry was inserted in the book, might have been produced, and that would have been better evidence of the cause of commitment.

In the above-cited case of the King v. Aickles, the clerk of the papers of the prison produced a daily book, kept by him, containing entries of the names of all the debtors and criminals brought into prison, and of the times when they were discharged; but it appeared that these entries were not made by the clerk on his own knowledge of the facts, but generally from the information of the turnkeys, and frequently from the turnkey's indorsements on the

(1) R. v. Martin, 2 Campb. 100.
(2) Price v. Littlewood, 3 Campb. 288.
(3) R. v. Aickles, 1 Leach Cr. C. 436.
(4) Salter and others v. Thomas, 3 Bos. & Pull. 188.

backs

backs of the warrants, which warrants were afterwards regularly filed. Upon this, it was objected that the entries in the book were mere copies, and that the original minutes, from which the entry of the prisoner's discharge had been made, ought to be produced as the best evidence. But the court overruled the objection, and admitted the contents of the book, as it appeared to have been the constant and established practice of the keepers of public prisons to register the discharge of prisoners in such books as the one produced, and in the manner there described.

In another case, a parish register of christenings was received in evidence as an original authentic book, although the constant practice in the parish was to make a memorandum of the christenings in a day-book, from which entries were some time afterwards made into the register (1). The question in that case was on the plaintiff's legitimacy, and on the part of the plaintiff a general parish register was produced, in which there was an entry of his christening, describing him in the same manner as legitimate children were usually entered. It appeared that the practice was to make the entries in this register once in three weeks, out of a day-book, in which entries were made immediately after the christening, or the same morning; and in the case of illegitimate children, to insert in the entry the letters B. B., which were intended to signify "base born." The counsel for the defendant then offered in evidence the day-book, from which the other entry was posted, and in which the letters B. B. were inserted, insisting that it was the original entry. But a majority of the judges present, on a trial at bar, were of opinion, that such evidence ought not to be received, on the ground, that there could not be two registers in the parish, and that the one first produced ought to be taken to be the true register.—If, indeed, the entry in the day-book, representing the plaintiff as illegitimate, had been signed by

(1) May v. May, 2 Str. 1072.

the reputed father or the mother, or made under their direction, such evidence would have been admissible as the declaration of a deceased parent on a question of legitimacy; but if, on the other hand, in the absence of such proof, the entry appeared to be merely a private memorandum kept for the purpose of assisting the clerk to make up the register, (and of that nature it seems here to have been considered,) in that case it could not be received as the original authenticated entry.

Rolls of manor courts.

The rolls of a court baron (which is the court of the freeholders,) or of the customary court (which is the copyholders' court,) are evidence between the lord of the manor and his copyholders or tenants. They are the public documents by which the inheritance of every tenant is preserved, and the records of the manor court, which was anciently a court of justice relating to all property within the manor (1). So ancient writings, not properly court rolls, but found among the court rolls, and delivered down from steward to steward, purporting to be made "assensu omnium tenentium," have been admitted as evidence to prove the course of descent within a manor; and this, although they were not signed by any of the tenants (2). And an entry in the court rolls, stating the several customs within the manor as found by the homage, and regulating the descent of the several species of tenure, was in another case (3) admitted to be good evidence of the mode of descent, although no instances were shewn of any tenant having in fact so taken under the custom. "It cannot be doubted," said Lord Kenyon, "that this evidence was admissible, for tradition and the received opinion are the lex loci. Here was full proof of a tradition respecting the custom of descent in this manor; it was the solemn opinion of twenty-four homagers, who are the constitutional judges of the court, delivered on an occasion when

(1) Gilb. Ev. 67. 4 T. R. 670.

(2) Denn dem. Goodwin v. Spray, 1 T. R. 466, 473.

(3) Roe dem. Beebee v. Parker, 5 T. R. 26. Roe dem. Bennett v. Jeffery, 2 Maule & Selw. 92.

they

they were discussing the interests of all the tenants of the manor."

Upon the same principle, in an action by a copyholder against a freeholder of a manor for surcharging the common (1), an old writing, found among the muniments of the manor, and purporting to be signed by many of the copyholders, stating that the commoners of the manor had an ancient unlimited right of common, but that they had agreed to a certain stint, was held admissible evidence of the reputation of the manor at that time, as to the general prescriptive right of common, against the limited right insisted on by the plaintiff; and although it was not proved that the instrument had been signed by a majority of the copyholders, or that the plaintiff held the copyhold tenement under any one of those who had signed, yet that circumstance could not affect the admissibility of the instrument, which was offered in evidence, not on the footing of an agreement, but as evidence of tradition and the received opinion within the manor.

Terriers. Terriers are of two kinds, temporal and ecclesiastical. It has been established by a variety of cases, that old terriers or surveys of a manor are evidence of manorial tenures or boundaries (2). And so, an ecclesiastical terrier is evidence of the possessions of a church, if it has been regularly made and preserved in the proper repository. By the ecclesiastical canons, an inquiry is directed to be made, from time to time, of the temporal rights of the clergyman in every parish, and to be returned into the registry of the bishop. This return, which is generally signed by the minister, is denominated a terrier, and derives its authority from being found either in the bishop's register office (3), or the registry of the archdeacon of the diocese (4). Unless it comes from one of these repositories, it cannot, in general, be admitted

(1) Chapman v. Cowlan, 13 East, 10.

(2) Gilb. Ev. 69.

(3) Atkins v. Hatton, 4 Gwill. 1406. 2 Anstr. 386. S. C. 4 Gwill. 1593.

(4) Potts v. Durant, 4 Gwill. 1450, 4.

in

in evidence. A paper therefore, purporting to be a terrier, found in the charter-chest of a college, which had property in the parish, was thought to be inadmissible to disprove a modus (1). However, under particular circumstances, this rule has been relaxed, and a terrier has been admitted, though not brought from one of the regular repositories, where the custody in another place has been satisfactorily explained. Thus a terrier, found in the registry of the dean and chapter of Lichfield, was admitted to be evidence against one of the prebendaries (2). This evidence was rejected at the trial; but a new trial was afterwards granted by the court of King's Bench, on the ground, that the evidence ought to have been received, as there appeared to be a proper connection between the terriers and the place, where it was found; and a strong corroborating circumstance was, that the terrier was found annexed to an old lease of the prebend, of nearly the same date (3). But when the custody is merely private and unconnected with the subject-matter, the courts have never gone the length of admitting such papers in evidence. An instrument, therefore, purporting to be an endowment, without the seal of the bishop, and another, purporting to be an Inspeximus of the former under his seal, were rejected, because they came out of the hands of a private person entirely unconnected with the matters contained in them (4). For the same reason, before ancient grants can be admitted as evidence of private rights, the custody, in which they have been kept, ought to be satisfactorily explained. In a late case, a grant to an abbey, contained in a manuscript intitled "Secretum Abbatis" in the Bodleian library at Oxford, was rejected, as not coming from the proper custody (5); and, on the authority of this case, Mr. Justice Lawrence held, that an old grant to a priory, brought from the Cottonian manuscripts in the British Museum, could not be received, as it was not shewn that the possession of the

(1) 4 Gwill. 1406.
(2) Miller v. Foster, 4 Gwill. 1406. n.
(3) 4 Gwill. 1453.
(4) Potts v. Durant, 4 Gwill. 1450.
(5) Michell v. Rabbets, cited 3 Taunt. 91.

the grant was connected with any person who had an interest in the estate. (1)

A terrier is strong evidence against a parson; but it is never admitted for him, unless it be signed by a churchwarden, or (if the churchwardens are nominated by him,) by some of the substantial inhabitants of the parish (2). Terriers are generally signed by the minister of the parish; but this does not appear to be essentially necessary. In a late case (3), on a bill, filed by a vicar against the impropriatrix of a rectory, for agistment tithe, a terrier was given in evidence, on the part of the vicar, signed only by the churchwardens; it was objected, first, that it was not a terrier, because made by the churchwardens alone, and not signed by the vicar; secondly, that even supposing it to be a proper terrier, yet that it could not be admitted in evidence in that cause against the rector, as it was not signed by any person claiming under, or on the part of, the rector. However, the court were of opinion, that the terrier was admissible; that such imperfect terriers were now uniformly received; that the terrier in question was signed by persons who were in no respect interested, and whose duty it was, from their official situation, to sign it; and that the want of the vicar's signature made it stronger evidence in favour of his successor.

Herald's books.

The ancient books of the herald's office (4), and their visitation-books of counties (5), are evidence on a question of pedigree. The visitation-books contain the pedigrees and arms of the nobility of the kingdom from the twenty-first year of Henry VIII. to the latter end of the seventeenth century, during which period the two provincial kings of arms, soon after their investiture in office, usually received a commission under the great seal, authorizing them

(1) Swinnerton v. Marquis of Stafford, 3 Taunt. 91.
(2) Bull. N. P. 248.
(3) Illingworth v. Leigh, 4 Gwill. 1615.
(4) King dem. Lord Thanet v. Foster, 2 Jon. 224.
(5) Pitton v. Walter, 1 Str. 161. Matthews v. Port, Comb. 63.

them to visit the several counties within their respective provinces, "to take survey and view of all manner of arms, cognizances, crests, and other like devices, with the notes of the descents, pedigrees, and marriages of all the nobility and gentry therein contained; and also to reprove, control, and make infamous by proclamation, all such as unlawfully and without just authority usurp or take any name or title of honour or dignity." The first of these commissions was issued in the twenty-first year of Henry VIII., and the last in the second of James II. (1) From these visitation-books, entries were afterwards made into the books kept at the College of Heralds.

A licence from the Pope, granted in the reign of Edward the Second, has been adjudged to be evidence of an impropriation, the Pope being formerly the supreme head of the church, and having the disposition of all spiritual benefices (2). For the same reason, a Pope's bull was formerly admitted in evidence, to shew that monastery lands had a special exemption from the payment of tithes. (3) **Pope's bull.**

Corporation-books, containing an account of the privileges or public transactions of the body, are evidence in a suit between the several members, on the same footing, as manor-books between the tenants of a manor. But they are not evidence in favour of a corporation to support a claim of right against a stranger (4); and before they can be admitted in any case, it ought to be shewn that they have been regularly kept by the proper officer of the corporation. On an information in the nature of a quo warranto, the prosecutor produced in evidence a book written by the prosecutor's clerk, not an officer of the corporation, which appeared to be only minutes of corporate acts done some years before, and was not kept as a public book of the corporation; **Corporation-books**

(1) See First Report of the House of Commons on the Public Records, p. 82. Appendix, (c. 8.)

(2) Cope v. Bedford, Palm. 427.

(3) Lord Clanricard's case, Palm. 37.

(4) 1 H. Black. 214 n. (c). Mayor of London v. Mayor of Lynn.

this

this evidence was rejected at the trial, and, on a motion afterwards for a new trial, the court held that it had been properly rejected. "Corporation-books," the Court said, "are generally allowed to be given in evidence, when they have been publicly kept as such, and when the entries have been made by the proper officer; not but that entries made by other persons may be good, if it be shewn that the town-clerk is sick, or refuses to attend." (1)

Histories.

A general history may be admitted, says Mr. Just. Buller, to prove a matter relating to the kingdom at large (2). Thus, in the case of St. Katherine's Hospital, Lord Hale allowed Speed's Chronicles to be evidence of a particular point of history in the time of Edward III. (3) And the same book was admitted as evidence of the death of Edward the Second's queen, in the case of Lord Brounker v. Sir R. Atkins (4), where Ch. J. Pemberton said, he knew not what better proof they could have. Histories, however, it is admitted, cannot be received as proof of a private right or particular custom (5). Camden's Britannia was therefore rejected on an issue, whether by the custom of Droitwich salt-pits could be sunk in any part of the town, or only in a certain place (6). And in another case where the question was, whether a particular abbey was of the inferior order, Dugdale's Monasticon was refused, because the original records might be had in the augmentation-office (7). So, it has been determined, that Dugdale's Baronage is not evidence to prove a descent. (8)

Proof of entry in public books.

With regard to the proof of entries in public books, it is now clearly settled, that wherever an original is of a public nature and admissible in evidence, an examined copy

(1) R. v. Mothersell, 1 Str. 92. 12 Vin. Abr. Evidence, (A. b. 15) pl. 16.

(2) Bull. N. P. 248.

(3) 1 Vent. 151. Stainer v. Burgesses of Droitwich. 1 Salk. 282. Skin. 623. S. C.

(4) Skin. 14.

(5) Bull. N. P. 248. Cockman v. Mather, 1 Barnard. 14.

(6) 1 Salk. 282. Skin. 623.

(7) Ib.

(8) Piercey's case, 2 Jon. 164.

will

will equally be admitted (1). The rule is necessary, as well for the security of the instrument, as for the convenience of the public. Examined copies, therefore, of entries in the Journals of the Lords or Commons (2), or of entries in the Bank books (3), or in the books of the East India Company (4), and examined copies of entries in parish registers, or in the books of assessments made by the commissioners of land tax (5), or in the books of the commissioners of excise (6), or in the court rolls of a manor (7), and in other cases of the same kind, have been admitted in evidence, when the original books themselves would have been admissible. But where an original is of a private nature, a copy will not be evidence, unless the original is lost, or destroyed, or in the possession of the opposite party. Thus, the copy of an old letter, brought from the chest of a corporation, has been refused (8). In one case, indeed, where the original was kept in the Bodleian library at Oxford, and by the statutes of the university not removeable, an examined copy was allowed to be given in evidence (9); the court admitted the case not to be within the general rules of evidence, but, under the particular circumstances, permitted the copy to be read.

(1) Per Holt C. J. in Lynch v. Clerke, 3 Salk. 153. R. v. Haines, Comberb. 337. Skin. 583. S. C.

(2) Jones v. Randal, Cowp. 17. R. v. Ld. G. Gordon, 2 Doug. 593.

(3) Marsh v. Colnet, 2 Esp N. P. C. 665. Breton v. Coape, Peake N. P. C. 30

(4) 2 Doug. 593. n. (3).

(5) R. v. King and others, 2 T. R. 234.

(6) Carth. 346. R. v. Commissioners of Land-tax, 2 T. R. 234.

(7) Tucky v. Flower, Comberb. 137. R. v. Haines, ib. 337., per Holt C. J. Doe dem. Churchwardens of Croydon v. Cook, 5 Esp. N. P. C. 221.

(8) R. v. Gwyn, 1 Str. 401.

(9) Downes v. Moreman, 2 Gwill. 659. Bunb. 189. S. C.

CHAP. VII.

On the Inspection of Public Writings.

Records.

THE judicial records of the king's courts are safely kept for the public convenience, that any subject may have access to them for his necessary use and benefit: which was the ancient law of England, and is so declared by an act of parliament in the forty-sixth year of Edward the Third (1).

Copy of indictment.

Some restriction, however, of the general right of inspecting records has been thought necessary in the case of an acquittal on a prosecution for felony; in which case, if the trial is at the Old Bailey, a copy of the indictment cannot regularly be obtained without an order from the court; and it is a common practice, on the circuits, to apply to the court for a copy at the time of the trial. This practice appears to have been first adopted at the Old Bailey, in pursuance of an order made by some of the judges, for the regulation of those sessions in the twenty-sixth year of Charles II. (2) It was then ordered, "that no copies of any indictment for felony be given without special order, upon motion made in open court, at the general gaol delivery; for the late frequency of actions against prosecutors (which cannot be without copies of the indictment) deterreth people from prosecuting for the king upon just occasions." And Lord Holt has laid it down as a general rule of law, that if a person be indicted for felony and acquitted, and means to bring an action (without sufficient cause), the judge will not permit him to have a copy of the record, and he cannot have a copy without leave (3). In the case of Vander-

(1) 3 Inst. 71. Pref. to 3d Rep., p. 3, 4.

(2) Directions for Justices at the Old Bailey, prefixed to Kelyng's Rep. p. 3., order 7. See Brangam's case, 1 Leach Cr. C. 32. In this case, Willes C. J. is reported to have said, that, by the laws of the realm, every prisoner upon his acquittal has an undoubted right and title to a copy of the record, for any use which he may think fit to make of it; and that, after a demand, the proper officer might be punished for refusing to make out a copy.

(3) In the case of Dr. Groenvelt v. Dr. Burwell and Others, 1 Ld. Raym. 253.

comb and Abbott (1), the prisoners after their acquittal applied for copies of the several indictments, for the purpose of assisting them in their plea of autrefois acquit: the court, however, refused to grant them copies, but ordered the officer to read over the indictments slowly and distinctly, which was accordingly done.

The rule of the judges states, that an action against a prosecutor cannot be maintained without a copy of the indictment, and that a copy is not to be given without an order from the court; but it is not to be inferred from this, that an order is essentially necessary for the introduction of a copy in evidence, or, if a copy were offered to be produced without an order, that it could on that account be properly rejected. The admissibility of such evidence has been determined in the late case of Legatt v. Tollervey (2). On the part of the plaintiff, in that case, the clerk of the court of quarter sessions, before which the indictment had been tried, produced a copy, which, for want of an order, was not allowed to be read; and the plaintiff was in consequence nonsuited. But the Court of King's Bench were of opinion that the evidence ought to have been received, and set aside the nonsuit. "It is very clear," said Lord Ellenborough C.J., "that it is the duty of the officer, charged with the custody of the records of the court, not to produce a record but upon competent authority, which at the Old Bailey is obtained upon application to the court, pursuant to the order that has long prevailed there; and, with respect to the general records of the realm, upon application to the Attorney-General. But if the officer, even without authority, shall have given a copy of a record, or produce the original, and that is properly proved in evidence, I cannot say that such evidence shall not be received. He may incur the penalty of his contempt of the court, and may be warned, at the time, of his peril in so doing, and a discreet officer placed in such a situation would, before he

(1) 2 Leach Cr. C. 821.

(2) 14 East, 302.

produced the record, or gave a copy of it, apply to the court, and state the circumstances; and it cannot be doubted, that he would be saved harmless in doing, what, after such disclosure, the court should order him to do. But still I cannot help thinking, that the rule laid down by Lord Ch. J. Lee, in the case of Jordan v. Lewis (1), is the correct rule. The order made at the Old Bailey was there read by way of objection to the evidence offered, but the Chief Justice, in that case, said, that he could not refuse to let the plaintiff read the copy of the indictment, though obtained without any order of the court for that purpose."

The rule, which has been before mentioned, is confined to cases of felony. In prosecutions for misdemesnors, the defendant is still entitled to a copy of the record, as a matter of right, without a previous application to the court (2). So, in the case of a conviction by a magistrate, the defendant is entitled to a copy of the conviction, in order to defend himself against an action for the same offence; and if it should be refused, and the Defendant in consequence sue out a writ of certiorari, merely for the the purpose of procuring a copy and making his defence, the magistrate will be compelled to pay his own costs of returning the conviction (3). The conviction may be drawn up at any time, before the return to the certiorari or to the sessions, though after a commitment (4), or after the levying of the penalty (5). And the conviction returned to the sessions, or to the court of King's Bench, is the only one, of which those courts will take judicial notice. (6)

A defendant on a criminal charge, is not entitled to an inspection of the grounds, upon which the prosecution has

(1) 2 Stra. 1122. 14 East, 305. n. (a), S. C., reported from Mr. Ford's MS.

(2) Morrison v. Kelly, 1 Black. Rep. 385. Evans v. Philips, reported from MS. in Selw. Ni. Pri. 952.

(3) R. v. Midlam, 3 Burr. 1721.

(4) Massey v. Johnson, 12 East, 67. 82.

(5) R. v. Barker, 1 East, 186.

(6) Ib. 188.

been

been instituted. In some species of treason, indeed, the prisoner is entitled to a copy of the indictment, a privilege not allowed by the common law, but conferred by act of parliament; but neither in cases of treason, nor of felony, has he any right to a copy of the depositions of witnesses, who are to appear against him. So, when informations are filed by the Attorney-General, on depositions taken under the excise laws, the defendant is not allowed to inspect those depositions. And in a case where an information was filed against an officer of the East India Company, on charges of delinquency founded upon the report of a board of inquiry in India, the court of King's Bench were of opinion, that the defendant had no right to have an inspection of that report, and that the court had no discretionary power to grant it (1). "The practice on indictments at common law, and on informations upon particular statutes," said Mr. Just. Buller on that occasion, "shews it to be clear, that the defendant is not entitled to inspect the evidence, on which the prosecution is founded, till the hour of trial." It has been observed (2), that one of the objects, which the legislature had in view, in passing the statutes relative to depositions taken by magistrates in cases of felony, was to enable the judge and the jury, before whom the prisoner is tried, to see whether the witnesses at the trial are consistent with the account, which they have given before the committing magistrate; it seems reasonable, therefore, that at the time of the trial the prisoner, on an application to the court, should be allowed to see the deposition of a witness called to give evidence against him, and cross-examine as to any variance or inconsistency in his testimony.

Proceedings of inferior jurisdictions.

The right of inspecting the proceedings of inferior jurisdictions is more limited. It cannot be necessary for the interests of the public, that they should be open for inspection to all persons without distinction; but, on the other hand, it seems reasonable, that, in any suit, where the re-

(1) R. v. Holland, 4 T. R. 691. (2) See ante, p. 279.

gularity of those proceedings may come into question, a party should have the power of taking a copy of such, as have been instituted against himself. In an action of trespass and false imprisonment, brought by the plaintiff, who had been sued in the court of conscience in London, the court of King's Bench allowed the plaintiff to inspect the proceedings, so far as they related to the suit against himself, on the ground that every one has a right to look into the proceedings to which he is a party (1). In another case, where the plaintiff, having been fined for neglect of duty, as an under-officer to the commissioners of lieutenancy for the city of London, brought an action of trespass against the defendant for distraining upon him, the court granted the plaintiff a rule for inspecting and taking copies of the rates and assessments made by the commissioners (2). On the same principle, in an action for a malicious prosecution and false imprisonment, the plaintiff may obtain a rule for a copy of the information, upon which he was committed; and, as the original itself ought to be produced at the time of the trial, the court will also grant a rule, calling upon the committing magistrate to cause it to be produced. (3)

A different rule, however, was adopted by the court in the case of Dr. Groenvelt v. Dr. Burwell (4), and in Abery v. Dickenson (5). The first of these cases was an action for false imprisonment against the defendants, who justified as censors of the college of physicians by virtue of their charter, by which charter they have power to fine and imprison *pro non bene utendo facultate medicinæ*; they then set forth, that the plaintiff at such a time and place had administered unwholesome medicines to A. B, and so justified the taking and imprisoning. The counsel for the plaintiff moved, that the register of the college should permit the

(1) Wilson v. Rogers, 2 Str. 1242.

(2) Edwards v. Vesey, Rep. temp. Hard. 128.

(3) R. v. Smith, 1 Stra. 126. Welch v. Richards, Barnes, 468. S. P. See also Herbert v. Ashurner, 1 Wils. 297; Moody v. Thurston, 1 Stra. 304; and R. v. Commissioners of Land-tax, 2 T. R. 234.

(4) 1 Ld. Raym. 253. 454. Carth. 421. 491. S. C.

(5) Say. 25c.

plaintiff

plaintiff to have copies of the proceedings and judgment, to enable him to reply to the defendant's plea in justification; and, in support of the application, it was said, that the plaintiff was a party to the judgment, and therefore had a right to a copy, and that it is the usual practice, if an action is brought for a false return to a mandamus, upon which the party is returned to be disfranchised, that the King's Bench will make an order for the plaintiff to have recourse to the public books. But the court refused a rule, saying, (as Lord Raymond reports the case,) " that they could not oblige the college of physicians to permit the plaintiff to have a copy of their proceedings, for they act in a judicial manner, by authority of an act of parliament; and therefore it shall be presumed, that they have done right." The report of this case by Carthew differs materially from that by Ld. Raymond. Carthew reports, that the court admitted the rule, for inspecting the proceedings, to be usual for the sake of evidence, *after issue joined*, but not by way of assisting the party to plead. The reason given in Ld. Raymond's report, (namely, " that the proceedings must be presumed to be regular, since the college acted in a judicial manner, by authority of an act of parliament,") seems to proceed upon the supposition that the proceedings were truly and correctly set out in the defendant's plea; and on a demurrer, (which admits all the facts in justification,) that reason would have been conclusive; it might then have been justly said against the demurrer, that, the defendants having shewn their authority over the plaintiff, and the fact, for which he had been punished, being within their jurisdiction as censors, and not traversable in this collateral suit, they could not be liable to an action for what they had done within the limits of their jurisdiction, and in the discharge of their judicial powers. But if, instead of demurring, the plaintiff, in such a case, had admitted the warrant under which the defendants arrested him, and replied that " they had committed the trespass of their own wrong and without the residue of the cause alleged in their plea," it would then have been competent for him to shew,

 that

that the defendants had exceeded their jurisdiction; and, for the purpose of enabling him to be prepared with this defence, the plaintiff seems to have been entitled, at least after issue joined, to an inspection of such proceedings as had been instituted against himself.

In the other case, before referred to, of Abery v. Dickenson (1), which was an action of trespass against the defendant for taking a distress for a penalty under an order of certain commissioners, the court of King's Bench is reported to have refused the rule, on the ground that the commissioners were not parties to the suit. The same objection might have been made in the other cases, which have been before cited (2); but the court there allowed an inspection, (although the persons, who had the custody of the goods, were not parties to the suit,) because the plaintiff, who applied for the rule, was the object of the proceedings, under which the defendants had acted. The authorities before cited seem, therefore, to establish the principle, that, if proceedings have been instituted by an inferior jurisdiction, the party affected by them ought to be allowed to take a copy of such as relate to himself, in any subsequent suit, in which the regularity of those proceedings may be disputed.

Books of public offices.

Parish registers, books of the India Company relating to the transfer of stock, books of the Bank, &c. are for some purposes considered as public books; and persons, interested in them, have a right to inspect and take copies of such parts as relate to their interest (3). So the books of the commissioners of the lottery, and their numerical lists, are of a public nature; and kept by the commissioners in trust for the ticket-holders, who are entitled to an inspection, by rule of court (4). But access is not allowed

(1) Say. 250.

(2) See cases cited in p. 326.

(3) Geery v. Hopkins, 2 Ld. Raym. 851. Warriner v. Giles, 2 Stra. 954. Mayor of London v. Swinland, 1 Barnardist. 455.

(4) Schinotti v. Bumstead and others. 36 G. 3., cited from a MS. case in 2 Tidd. Prac. 596.

lowed to such parish books, as are kept only for the private use of the parish, and relate to their private interests. An inspection was for that reason refused, in an action of ejectment by an impropriator against the churchwardens of a parish, where a rule was applied for, on the part of the plaintiff, suggesting, that the parish books would make the titles appear, and that they were the common books belonging to the parish at large; but the court were of opinion, that, when the person claims a distinct interest from that of the parish, it is not reasonable to compel the parish to discover their title by shewing their books, which are kept only for their own use (1). For the same reason a public company will not be compelled to produce any books relating to their private transactions. (2)

Nor will access be granted to the books of public offices, in collateral actions brought by persons, who have no interest in the books; therefore, in a qui tam action for penalties against a clerk in the post-office for interfering in the election of a member of parliament, the prosecutor was not allowed to have a rule for inspecting the books of the post-office, as the cause did not relate to any transaction in the post-office, for which transactions alone those books are kept (3). Nor will the court grant a rule for inspecting the custom-house books, for the purpose of furnishing evidence in an action between two persons, who have no interest in the subject-matter, concerning the amount of a particular branch of the public revenue. (4)

The court rolls of a manor are kept in the custody of the lord or his steward, not for the use of the lord alone, but as the common evidence of the manorial rights, to which evidence all the tenants of the manor, whether copy- Court rolls.

(1) Cox v. Copping, 5 Mod. 395. 1 Ld. Raym. 337. Lewis v. Baker, 1 Barnardist. 100. Turner v. Gethin, Vin. Ab. tit. Evidence, (F. b) pl. 11.

(2) Shelling v. Farmer, 1 Stra. 646. Murray v. Thornhill, 2 Stra. 717.

(3) Crew q t. v. Blackburn, cited 1 Wils. 240. 2 Stra. 1005. S. P.

(4) Atherfold v. Beard, 2 T. R. 614. 616.

hold

hold or freehold, have an undoubted right of access, as well in actions between the tenants and the lord, as between the tenants themselves (1); and it is now a matter of course to grant a rule for the inspection of the court rolls and ancient writings of a manor, on the application of a tenant, who has been refused by the lord. But this privilege is confined to the tenants of the manor, and cannot extend to third persons who have no concern or connection with the manor court or the court rolls. Thus in an action of trespass, where the question was, whether the place, in which the trespass was alleged to have been committed, was within the manor of the plaintiff, or part of a manor claimed by the defendant, the court held, that the defendant, who, as it appeared from his affidavit, was not a tenant of the plaintiff's manor, nor claimed any interest under him, could not be entitled to an inspection (2). And it may be laid down as a general rule, that where the question is on the custom of a manor between the lord and a stranger, the lord shall not be obliged to let him have an inspection of the rolls, because, in any dispute with a stranger, they may be considered as his private evidence; but if the dispute is between tenants of the manor, or between the lord and a tenant, the lord shall produce the roll, and permit copies to be taken.

Corporation books.

Corporation books are open to the members of the corporation, as court rolls are to the tenants of a manor *.

(1) Roe v. Aylmer, Barnes, 236. Hobson v. Parker, ib. 237. Addington v. Clode, 2 Black. Rep 1030. Folkard v Hemet, ib. 1061. R. v. Shelley, 3 T. R. 141.

(2) Talbot v. Villeboys, cited from MS. by Buller J. 3 T. R. 142. Smith v. Davies, 1 Wils. 104. Bp. of Hereford v. Duke of Bridgwater, Bunb. 269 Attorney-General v. City of Coventry, Bunb. 290.

* By stat. 32 G. 3. c. 58. s. 4. a penalty of a hundred pounds is incurred by any officer of the corporation, having the custody of the corporation records, who shall refuse to allow any other officer or member to inspect books and papers, wherein are entered the admission or swearing in of the freemen, burgesses, or members of the corporation, and to take copies or minutes of such admission, &c.

Thus,

Thus, where a mandamus had been granted to admit a person into a corporation, and by the return it appeared to be a question, whether the master, under whom he had served, had been admitted to his freedom in the corporation, a rule was moved for, on the part of the person claiming admission, to inspect the books of the corporation; and the court held that every member has a right to inspect and take copies of corporation-books for any matter that concerns himself, even in a dispute with strangers; but, as the return had pointed out the necessity of inspecting them for a particular purpose, the rule should be confined to such books as contained the admissions of freemen (1). So, where an information in the nature of a quo warranto had been obtained, at the relation of corporators, against a person charged with unlawfully holding a corporation-office, the court held that these relators were entitled to inspect the books, and that the rule should be limited to the inspection of such papers as related to the subject-matter in discussion. (2)

This right of inspecting the muniments of a corporation is confined to the members of the corporate body. A stranger has no better right to inspect corporation-books, than to inspect the books of any private person. On a prosecution against a person for practising physic, (not being a member of the college of physicians, nor having a licence, nor being a graduate of either university,) the defendant moved for leave to inspect the books of the college of physicians, but the court refused to grant the rule, as the defendant, who was not a member, had no right to see the books (3). And in an action of trespass, where the defendant justified under a corporation for distraining for a toll, the court refused a similar rule to the plaintiff, who

(1) Per Cur. in R. v. Fraternity of Hostmen in Newcastle, 2 Stra. 1222.

(2) R. v. Babb, 3 T. R. 579. Crew q. t. v. Saunders, 2 Stra 1005. Corporation of Barnstaple v. Lathey, 3 T. R. 303.

(3) Dr. West's case, cited 1 Wils. 240.

was

was a stranger to the corporation (1). A different practice was at one time introduced in courts of law (2), upon the ground, that, on filing a bill for disclosure in a court of equity, an inspection would be granted as a matter of course, and that it would only cause unnecessary expence to send them into that court. But this practice, which was not warranted by earlier authorities (3), nor conformable to the practice of courts of equity, has been long discontinued; and the rule of law, now established, is, that in disputes between several members of a corporation an inspection of the corporation-books will be granted, because each has a right to see them; but an inspection will not be granted in the case of a corporation, when a similar inspection would be refused, if the suit were between private persons. No distinction is to be made, in this respect, between a corporation aggregate and a corporation sole, nor between a corporation sole and a private person suing in his individual capacity. (4)

The rule for inspecting court-rolls, corporation-books, and other public writings, will not be allowed, where the party who has them in his custody, would, by producing them for inspection, disclose any evidence of a criminal nature, or expose himself to a prosecution. On an information, therefore, against several persons, for executing an office of trust without taking the oaths, the court refused a motion for leave to inspect some books kept by the defendants, in which they had entered their elections, receipts, and disbursements, as it would have compelled them to give evidence against themselves in a criminal prosecution (5): and a similar motion was refused, on an information against two overseers for making a rate without the

(1) Cited by De Grey C. J. in Hodges v. Atkis, 3 Wils 398., and per Lawrence J in 8 T. R. 594. Mayor of Southampton v. Graves, 8 T. R. 590.

(2) Mayor of Lynn v. Denton, 1 T. R. 689. Corporation of Barnstaple v. Lathes, 3 T. R. 303.

(3) Dr. West's case, cited 1 Wils. 240. R. v. Dr. Bridgeman, 2 Stra. 1203. Mayor of Exeter v. Coleman, Barnes, 238. Hodges v. Atkis, 3 Wils. 398.

(4) 8 T. R. 593.

(5) R. v. Mead, 2 Ld. Raym. 927. R. v. Worsenham, 1 Ld. Raym. 705 R. v. Corneius, 2 Stra. 1210.

con-

concurrence of the churchwardens (1). Another case to the same effect is the case of the King v. Dr. Purnel (2), where, on an information against the defendant, for a misdemeanour in his office of vice-chancellor of the university of Oxford, a rule for taking a copy of the university-statutes, in the care of the keeper of the archives, was refused by the Court of King's Bench, after great consideration; and the principle, that no man shall be bound to accuse himself, was fully recognized. This principle will not apply to the case of informations in the nature of a quo warranto, for usurping a franchise or intruding into a corporation-office: for such informations, although originally and strictly criminal methods of prosecution, are applied to the purpose of trying civil rights, and are considered at present as merely civil proceedings. On an information, therefore, exhibited at the relation of a member of a corporation, against a person for unlawfully executing an office, the relator, who as member has a right and interest in the books of the corporation, may obtain an inspection and copy of such, and such only, as relate to the subject matter in discussion. (3)

The motion for a rule to inspect and take a copy, where an action is depending, is founded on an affidavit stating the circumstances, under which the inspection is claimed; as, (where a party applies for the inspection of court-rolls,) that he is tenant of the manor, and that an application has been made to the lord or his steward, for leave to make the required inspection, which they refused (4); and, on such an affidavit the rule will be made absolute in the first instance. (5)

With regard to the proper stage of the proceedings for making the application, the court has refused the motion in an action against a corporation upon a right of toll, *be-*

(1) R. v. Lee, cited 1 Wils. 240.
(2) 1 Wils. 239.
(3) R. v. Babb, 3 T. R. 579.
(4) Roe v. Aylmar, Barnes, 236.
(5) R. v. Shelley, 3 T. R. 141.

cause

cause issue was not joined, so that it could not appear, whether an inspection would be necessary (1). And in the case of Dr. Groenvelt v. Dr. Burwell, before mentioned, where the plaintiff applied for a copy of the proceedings instituted against him by the college of physicians, the court admitted the rule for inspecting the proceedings to be usual, for the sake of evidence, *after issue joined*, but not by way of assisting the party to plead (2). If a rule has been granted to shew cause, why a mandamus should not be awarded, the court will not make a rule for inspecting and taking copies, until the first rule is made absolute, and a return is made to the mandamus (3); and it has been thought the most convenient practice, where a rule nisi for a quo warranto information has been obtained, not to grant an inspection, until the information is granted. (4)

If no action is depending, the proper motion is for a rule to shew cause, why a mandamus should not issue, commanding the officer, who has the custody of the books, to permit the party to inspect and take a copy. The affidavit, upon which this motion is founded, ought to state clearly the right, under which the inspection is claimed. In a case of this kind, where an inspection of the court-rolls of a manor was applied for, the party stated in his affidavit a primâ facie title to a copyhold of the manor; and the court of King's Bench held, that as he was clearly entitled to the copyhold, unless it had been conveyed away by those under whom he claimed, he had a right to see, whether any such conveyance appeared on the rolls, and the court therefore made the rule absolute, so far as related to the copyhold lands, the subject of the party's claim. (5)

(1) Hodges v. Atkis, 3 Wils. 398. 2 Black. Rep 877., S. C.

(2) Carthew. 421.

(3) Per Cur. in R. v. Justices of Surry, Say. 144.

(4) Per Ashurst J. in R. v. Babb, 3 T. R. 581. R. v. Hollister, Rep. temp. Hard. 245.

(5) R. v. Lucas, 10 East, 235.; and see 3 T. R. 142.

CHAP. VIII.

Of the Proof of Private Writings.

THE next branch of our subject, which remains to be considered, relates to private writings. In treating of this part of written evidence, we shall not attempt to describe the various kinds and requisites of private writings, which would far exceed the limits of the present work, but shall consider only two of the principal kinds, deeds and wills. The method of proving these is the subject of the following chapter; and the two succeeding chapters will treat shortly of the requisite of stamping, and of the admissibility of parol evidence to explain written instruments.

SECT. I.

Of the Proof of Deeds.

Subpœna duces tecum.

IF any deed or other writing, necessary to be produced at the trial of a cause, is in the possession of a third person, the legal process for compelling him to produce it is by suing out a writ of subpœna ad testificandum, (to enforce his personal attendance,) and inserting a special clause, called a duces tecum, which specifies the writings required, and commands him to produce them at the trial. The writ of subpœna duces tecum, like some other writs of undoubted antiquity, is not to be found in the registrum brevium; but it can be traced in practice as far back as the time of Charles II., and probably existed much earlier, as such a compulsory process is essential to the constitution of courts of justice. A witness, served with this subpœna, is obliged to attend; and, though it will be a question for the consideration of the judge, whether he ought to be compelled to produce the writings in his possession, yet undoubtedly he ought to be ready to produce them, if ordered by the court; and, in case of disobedience without sufficient

cause,

cause, will be liable to an attachment, or to a special action for damages (1). If the writing, which he is called upon to produce, would have a tendency to subject him to a criminal charge, or to a penalty, or any kind of forfeiture, the court will excuse him from producing it, as well as from answering any question of the same tendency; but, from analogy to the rule respecting parol testimony, (and there seems to be no good reason for allowing a greater privilege in the one case than in the other,) he would not be excused from producing a paper in his possession, relevant to the matter in issue, on the ground that it might establish, or tend to establish against him the fact of his being in debt, or subject to a civil suit. (2)

Notice to produce.

If writings are in the possession of a party to the suit, the other party has, in general, no means of compelling their production; and the utmost, therefore, that can be expected of him, in such circumstances, is to give the best evidence which the nature of the case admits. In some instances, indeed, where the writing is deposited in the custody of a defendant, as a trustee for all parties interested, courts of law will order him to furnish the plaintiff with a copy, and produce the original at the trial. Thus, in an action for a stake won at an horse-race, the defendant, who was the stake-holder, was ordered to produce a copy of the racing articles, without which the plaintiff could not proceed (3). So, in a late case, in an action of covenant, the court of Common Pleas granted the plaintiff a rule for taking a copy of an indenture of assignment of a lease, made between the plaintiff and defendant, as the only part of the indenture, which had been executed, was in the hands of the defendant (4); the parties, in this case, having executed one part only of the indenture, in order to save the expence of double stamps, the court thought it a necessary consequence, that the party, who

(1) Amey v. Long, 9 East, 473.

(2) See stat. 46 G. 3. c. 37. ante, p. 208.

(3) Gracewood v. ——, Barnes, 439.

(4) Blakey v. Porter, 1 Taunt. 386. King v. King, 4 Taunt. 666.

had

had the custody, undertook to produce the deed, when necessary, for the use of the other contracting party. And, upon the same principle, in an action by seamen to recover wages, the defendant is compellable to produce the ship's articles (1); for, the contract for wages always remains in the possession of the master, and the statutes (which require a written agreement in the case of foreign voyages (2), and in the case of certain vessels employed in the coasting trade (3),) expressly enact, that where it becomes necessary to produce the contract in court, no obligation shall lie on the seamen to produce it, but on the master or owners of the ship; and that no seaman shall fail, in any suit or process for the recovery of wages, for want of its production.

In an action between the plaintiff (a factor) and defendant (a grazier), the court of King's Bench, on the motion of the defendant, made a rule for the plaintiff to shew cause, why he should not produce at the trial the several books, in which he entered the amount of beasts sold, and of money received on the defendant's account; and, no cause being shewn, the rule was made absolute (4). The rule, which Lord Mansfield laid down in such cases, is said to be, that, wherever the defendant would be entitled to a discovery, he should have it in a court of law, without going into equity (5). In causes on policies of insurance, it is now the common practice to obtain a judge's order, calling upon the assured to produce to the underwriters, upon affidavit, all papers in the possession of the former relative to the matters in issue; and if the one party is not content with such papers as are produced under the order, the other party will be obliged to make an affidavit, denying the relevancy of those which he withholds (6). This

(1) Johnson v. Lewellyn, 6 Esp. N. P. C. 101. 1 Taunt. 386.
(2) St. 2 G. 2. c. 36.
(3) St. 31 G. 3. c. 39.
(4) Goater v. Nunnely, 2 Stra. 1130. Ward v. Apprice, 6 Mod. Rep. 264. contrà.
(5) Barry v. Alexander, 25 G. 3. K. B. 1 Tidd. Pr. 589.
(6) Clifford v. Taylor, 1 Taunt. 167. Goldschmidt v. Marryat, 1 Camph. 562.

practice has been adopted for its great convenience, as it saves the delay and expence of a bill in equity. But the practice in Chancery invariably is, that a party is entitled only to extracts of letters, if the other party will swear, that the passages extracted are the only parts relating to the subject-matter. (1)

But, in general, one party has not the means of compelling the other party to produce any writings in his possession, however necessary they may be for the prosecution of his suit. If such evidence is required, the rule, both in civil and in criminal cases (2), is to give the opposite party or his attorney (3) a regular notice to produce the original; not, that on proof of the notice he is compellable to give evidence against himself, or that, if he refuses to produce the papers required, such a circumstance is to be considered as conclusive against him (4), but the consequence will merely be, that the other party, who has done all in his power to supply the best evidence, will be allowed to go into evidence of an inferior kind, and may read an examined copy, or give parol evidence of the contents. But, before this secondary evidence can be admitted, it ought to be clearly shewn, that the writing required is in the possession of the other party, and that a notice to produce it has been regularly served. If, in compliance with a notice, the party produces the writings in his possession, he is entitled to have the whole read (5); and if a writing produced refers to others with such particularity as to make it necessary to inspect them, that the sense may be complete, he may insist on having these also read in evidence. (6)

The rule, which requires, that a party shall have previous notice to produce a written instrument in his possession,

(1) 1 Taunt. 167.
(2) The Attorney-General v. Le Merchant, 2 T. R. 201. n.
(3) 1 T. R. 203. n. Cates q. t. v. Winter, 3 T. R. 306.
(4) Cooper v. Gibbons, 3 Campb. 363.
(5) See ante, p. 79. 265
(6) Johnson v. Gilson, 4 Esp. N. P. C. 21.

 before

before the contents can be proved as evidence in the cause, has been made with good reason; in order that the party may not be taken by surprize, in cases where it must be uncertain, whether such evidence will be brought forward at the trial by the adverse party. But this reason will not apply to cases, where from the nature of the proceedings the defendant has notice, that the plaintiff means to charge him with the possession of the instrument. It cannot here be necessary to give any other notice, than the action itself supplies. In an action of trover, therefore, for a bond, the plaintiff was allowed to give parol evidence of the contents, to support the general description of the instrument in the declaration, without having given the defendant previous notice to produce it (1). And on a prosecution for stealing a promissory note or other writing described in the indictment, parol evidence of the contents will be received, without any formal notice to the prisoner to produce the original. In Aickles' case (2), on an indictment for stealing a bill of exchange, all the judges held, that such evidence had been properly admitted, though it was proved in that case, that the bill had been seen, only a few days before the trial, in a state of negotiation, in the hands of a third person, who had been served with a subpœna duces tecum, but who did not appear. And in Layer's case (3), on an indictment for high treason, where it was proved, that the prisoner had shewn a person the paper, containing the treasonable matter laid in the indictment, and then immediately put it into his pocket, that person was permitted to give parol evidence of the contents of the paper. And in the case of De la Motte (4), on an indictment for a traiterous correspondence with the French government, where the question was, whether examined copies of the treasonable papers (which had been

(1) How v. Hall, 14 East, 274. Scott v. Jones, 4 Taunt. 865.

(2) 1 Leach, Cr. C. 330.

(3) 6 St. Tr. 263.

(4) Cor. Buller J. and Heath J. O.B. 1781, 1 East, P.C. 124. from MS. of Gould J. These copies were rejected on another ground, because the originals had not been traced to the prisoner's possession. See Howell's Coll. of St. Tr. vol. 21. p. 737.

secretly opened at the post-office, and copied, and then forwarded to their place of destination,) were admissible in evidence, the court held, that they might be admitted, after proof that the originals were in the hand-writing of the prisoner.

Nor does the principle of the rule apply to the case, where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as, where a witness was called, on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared that after the commencement of the action he had given it to the plaintiff; in this case, though notice to produce had not been given, parol evidence of the contents was admitted, because the paper belonged to the witness, and had been secreted, in fraud of the subpœna. (1)

The counterpart of a deed is evidence against the person who signed it, and against his assignee, without giving notice to produce the original. Thus in an action against the master of an apprentice, for not inserting in the indenture of apprenticeship the true consideration, an averment in the declaration, that A. B. by a certain indenture put himself apprentice to the defendant, may be proved by that part of the indenture which the defendant executed (2). So, in an action of ejectment, upon a condition of re-entry for non-payment of rent, against the assignee of a lease, proof of the counterpart, executed by the original tenant, is sufficient proof of the assignee's holding on the same terms. (3)

Another case may here be mentioned, in which a majority of the judges in the Court of King's Bench were of opinion, that want of notice was not a sufficient objection,

(1) Leeds v. Cook, 4 Esp. N. P. C. 256.

(2) Burleigh v. Stibbs, 5 T. R. 465.

(3) Roe dem. West v. Davis, 7 East, 363.

against

against receiving parol evidence of the contents of a deed, because it appeared that the deed itself was in court in the possession of the opposite party (1). At the trial of an ejectment, on the several demises of Haldane and Urry, title was deduced to Haldane under a will; but one of the plaintiff's witnesses said, on cross-examination, that Haldane had conveyed all interest in the premises to Urry, before the time of the demise in the declaration, and that the deed was in court. Upon this, it was insisted, that as the plaintiff's witness proved the title out of Haldane, and as the deed of conveyance was in the court, the deed ought to be produced in evidence to shew a title in Urry, the other lessor of the plaintiff. The counsel for the plaintiff, on the contrary, refused to produce the deed, insisting that the plaintiff ought to recover under one or the other of the lessors; for, if the one had parted with the title, the other had acquired it. But Mr. J. Aston, who tried the cause, being of opinion that the plaintiff ought to give further evidence to ascertain the title, under which he was to recover the term, nonsuited the plaintiff; and on a motion afterwards for setting aside this nonsuit, Lord Mansfield, after observing that in the action of ejectment the plaintiff could not recover but upon the strength of his own title, said, "it was plain the plaintiff had no title under Haldane, who had conveyed away all the interest in the premises to the other lessor, and, that as to his claim of a title under Urry, the plaintiff had not proved any title; the jury could not have found for the plaintiff under the deed of conveyance to Urry, unless it were produced, and probably there was something in the deed, which would have shewn, that Urry had no title." Lord Mansfield laid the principal stress on the fact of the plaintiff's refusing to produce the conveyance from Haldane, which was admitted to be in court. "The want of notice," he said, "was no objection in this case, because they had the deed in court; and the refusal to produce it warranted the strongest presumption,

(1) Doe on the several demises of Haldane and Urry v. Harvey, 4 Burr. 2484.

 that

that neither of the lessors had any title." Mr. Justice Aston and Mr. Justice Willes agreed in opinion with Lord Mansfield. But Mr. Justice Yates differed from the rest of the court. "He founded himself," he said, "upon the rules of evidence. The fact of the conveyance coming out on cross-examination could make no difference. The plaintiffs' counsel were not obliged to produce the deed, for no man can be obliged to produce evidence against himself; the only consequence of a notice to produce would have been the admission of inferior evidence." Upon this case it may be observed, that the fact of Haldane's having conveyed away all his interest to Urry seems to have been assumed as satisfactorily proved; but from the opinion of Mr. Justice Yates, (which seems to be the better opinion,) it may be collected, that there was no legal proof of any conveyance of title out of Haldane, and that the answer of the witness, upon which the defendant's argument rested, was as inadmissible in evidence on the cross-examination, as it would have been on an examination in chief. The true objection to such evidence is, that the witness was speaking to the contents of a deed, when there had been no notice given to produce the original; and it does not appear to be a sufficient answer to say, that the deed is in court; for, if the party had received a regular notice to produce it, he might have come prepared with evidence to repel any inference, which the production of the deed might have raised against him.

Proof of notice.

A parol notice, to produce writings, may be proved by a third person who delivered the notice, or by one who heard it delivered; and a written notice may be proved by a duplicate original (1). A notice to quit may be proved in the same manner by a duplicate original, in an action of ejectment. It may be objected, that the duplicate is not the best evidence of the contents of the notice delivered, as the supposed duplicate original may be inaccurate, and the

(1) Gotlieb v. Danvers, 1 Esp. N. P. C. 455. Surtees v. Hubbard, 4 Esp. N. P. C. 203.

contents

contents may be proved to a certainty by the production of the notice itself; but, on the other hand, extreme inconvenience would arise from a stricter medium of proof; for, if a duplicate notice to quit is not sufficient, no more is a duplicate of the notice to produce, and thus notices might be required in infinitum. The practice of allowing duplicates of this kind in evidence seems further to be sanctioned by this principle, that, as the original delivered is in the hands of the other party, it is in his power to contradict the duplicate original, by producing the other, if they vary (1). Upon the same principle, where a notice is given to a magistrate previous to the commencement of an action against him, or where a demand is made of a copy of a warrant preparatory to an action against a constable, if another paper is made out at the same time precisely to the same effect as that delivered, both may be considered originals, and the paper so preserved may be received in evidence without a notice to produce the one delivered (2). From analogy to these cases, in an action on an attorney's bill, though the plaintiff cannot produce parol evidence of the contents of the bill delivered, without giving notice to produce it, yet a copy, made out at the same time and proved to be correct, has been admitted to be good evidence (3). A duplicate, which has been taken from an original letter at a single impression by means of a copying machine, is still only a copy; and therefore cannot be read, without a previous notice to the other party to produce the original. (4)

Deed, produced under notice, how proved.

If a party, in compliance with a notice, should produce a deed, or other instrument, called for by the adverse party, the next question is, which of the parties ought to prove the execution, the one who calls for its production, or the other who produces. The general rule, laid down by Mr. Justice Buller, is, that "in civil actions, where a plaintiff

(1) Per Lord Eldon C. J. Jory v. Orchard, 2 Bos. & Pull. 41.
(2) 2 Bos. & Pull. 39.
(3) Anderson v. May, 2 Bos. & Pull. 237. Philipson v. Chase, 2 Campb. 110. S. P. Ackland v. Pearce, 2 Campb. 601.
(4) Nodin v. Murray, 3 Campb. 228.

wishes to give in evidence a deed in the defendant's custody, he gives the defendant notice to produce it; and the deed, when produced, must primâ facie be taken to be duly executed; because the plaintiff, not knowing who are the subscribing witnesses, cannot come prepared at the trial to prove the execution (1)." Therefore, in a case of settlement, where the respondents had given notice to the appellants to produce an indenture of apprenticeship, by which the pauper was bound in the appellant parish, and which indenture was accordingly produced at the trial of the appeal, the court of King's Bench held, that the court below ought not to have required the respondents to prove the execution, but that the indenture should have been admitted primâ facie as duly executed. (2)

In the next reported case on this subject, the case of Gordon and others v. Secretan (3), Ld. Ellenborough C. J. said, that the case of the King v. Middlezoy had been much questioned at the time, and since overruled; and that the production of an instrument at the trial, in pursuance of a notice, would not supersede the necessity of proving it by one of the subscribing witnesses, as in ordinary cases. And Mr. Justice Lawrence added, that this point had been so ruled by Lord Kenyon in a subsequent case, where the adverse party, having notice to produce a written instrument, produced it accordingly at the trial, and Lord Kenyon held, that the party, who called for it, was bound to call one of the subscribing witnesses to prove the execution. In the case of Gordon and others v. Secretan, which was an action upon a policy of insurance on shipped goods, the plaintiffs averred in their declaration that they were interested in the subject-matter of the insurance, and the defendant, intending to dispute that fact at the trial, gave the plaintiffs notice to produce certain articles of agreement made between them and the captain of the ship, by which, as it was contended,

(1) 2 T. R. 43.

(2) R. v. Inhabitants of Middlezoy, 2 T. R. 41.

(3) 8 East, 548. Wetherston v. Edgington, 2 Campb. 94. S. P.

the

the contrary would clearly appear: in pursuance of this notice, the plaintiffs at the trial produced the instrument attested by two witnesses, and insisted that the defendant should call one of them to prove the execution. The point was so ruled at nisi prius, and afterwards confirmed by the court of King's Bench. From this case, therefore, it might be inferred, that, if a party to a suit, in consequence of a notice, produces an instrument executed between himself and others, yet that the other party, though a stranger to the instrument, ought to prove the execution, if he means to avail himself of it in evidence.

The rule, however, has been properly restricted by the late case of Pearce v. Hooper and others (1). That was an action of trespass, and the question at the trial was, whether the place, in which the trespass was alleged, belonged to the plaintiff as part of a certain estate; the defendants gave notice to the plaintiff to produce a deed of conveyance, in which the estate had been conveyed to the plaintiff by a description limited to a number of acres, which, it was said, would necessarily exclude the place in question; the plaintiff produced the conveyance, and, on the authority of the cases before mentioned, it was ruled, that the defendant ought to prove the execution, which, as he was not prepared to prove, the instrument could not be received in evidence. But on a motion afterwards for a new trial, the court of Common Pleas were of opinion, that it was not necessary for the defendants, in this case, to call the attesting witness to prove the execution. The court admitted, that the mere possession of an instrument by one party cannot, in general, absolve the other party, who calls for it, from the necessity of producing the attesting witness. An instance to illustrate this, said the chief justice, had been properly put in the case of a will, cited in Gordon v. Secretan; for, supposing that an heir at law is in possession of a will, and the devisee brings an ejectment, and calls on the heir

(1) 3 Taunt. 62.

to

to produce the will, there the heir claims not under the will, but against the will, and it would be hard, that the will should be taken as proved against him, because he produces it. But that is very different from the case, where a man is called upon to produce a deed, under which he holds an estate. The defendant (added the chief justice, with reference to the case then before the court,) has no interest in the fee simple of the estate, if this deed does not convey it: if then he produces the deed, under which he claims, shall it not be taken to be a good deed (so far as relates to the execution), as against himself?" The other judges concurred in opinion, and a new trial was granted. The result therefore at present appears to be, that when a party to a suit, in pursuance of a notice, produces an instrument, to which he is a party, and under which he claims a beneficial estate, it will not be necessary, that the other party, a stranger to the instrument, should call an attesting witness to prove the execution; but that, in other cases, the execution ought to be regularly proved by the party, who offers the instrument as part of his evidence in the cause.*

Secondary evidence, when admitted.

If a party intend to use a deed or any other written instrument in evidence, he ought to produce the original, if he has it in his possession; but, if the instrument is in the possession of the other party, who refuses to produce it after a reasonable notice, or if the original is lost or destroyed, secondary evidence, which is the best that the nature of the case allows, will in that case be admitted. The party, after proving any of these circumstances, to account

* The plaintiff may have a rule nisi, calling on the defendant, to produce a deed before the commissioners of the stamp-office, to be stamped; or to give the plaintiff a copy of a deed, in order that he may declare upon it. Cooke v. Stocks, 36 G. 3. K. B. 1 Tidd. Prac. 486. Bateman v. Philips, 52 G. 3. C. P. ib. And where the plaintiff commenced an action of covenant on an indenture of assignment of a lease, only one part of which had been executed, and that was in the hands of the defendant, the court of Common Pleas granted the plaintiff a rule nisi, for reading and taking a copy of this part. Blakey v. Porter, 1 Taunt. 386. See ante, p. 336.

for

for the absence of the original, may read the counter-part; or, if there is no counter-part, an examined copy; or, if there should be no examined copy, he may give parol evidence of the contents (1). Proof by a witness, that the paper in question was thrown aside as useless, and that he believes it to be lost or destroyed, will be sufficient to let in the secondary evidence (2). And, in a late case, where it appeared, that the defendant had acknowledged the receipt of a letter of a particular date, which he refused to produce at the trial, it was ruled, that an entry in a letter-book, (purporting to be a copy of a letter of the same date from the plaintiff to the defendant, and inserted by a deceased clerk, who kept the book according to the course of business, and with great punctuality,) was admissible evidence of the contents of the letter in question (3). It is scarcely necessary to observe, that the rule in this respect is precisely the same both in criminal and in civil cases.

If the ground for admitting the secondary evidence is, that the original has been lost, it ought to be shewn, that every reasonable enquiry has been made, and the last person, into whose possession it is traced, should be called to give some account of the instrument. Thus, in a case of settlement, where it appeared that an indenture of apprenticeship consisted of two parts, one of which had been destroyed, and the other had come to the hands of a person, who was living and had not been subpœna'd, but had been heard to say, that he could not find the part, and did not know where it was, the court of King's Bench was of opinion, that this was not a sufficient ground for admitting parol evidence of the contents (4). But if the indenture were to be traced into the hands of a deceased person, who, in answer to inquiries respecting it, had stated, that it was destroyed while in his possession, any further search for

(1) Villiers v. Villiers, 2 Atk. 71.

(2) R. v. Mr. Just. Johnson, 7 East, 66. 8 East, 284.

(3) Pritt v. Fairclough, 3 Campb. 305.

(4) R. v. Castleton, 6 T. R. 236. R. v. St. Sepulchre, 2 Bott 353.

this

this part of the instrument would be unnecessary and nugatory. Thus, in a very late case (1), on a similar question of settlement, where it appeared, that only one part of the indenture was executed, that the pauper and master were both dead at the time of the trial, and that an enquiry had been made of the pauper, (who said, that the indenture had been given up to him after the expiration of the apprenticeship, and that it had been burnt,) and also of the daughter and executrix of the master, (who said, she knew nothing about it,) under these circumstances the court of King's Bench were of opinion, that a sufficient inquiry had been made to render parol evidence of the contents admissible; and the distinction, taken between this case and that of the King and Castleton, was, that, in the former, there was evidence of a fact which made a further search necessary, but that here a fact appeared in evidence, which made a search nugatory. If two parts of a deed, or more, have been executed, the loss or destruction of all the parts should be proved, before secondary evidence of the contents can be received (2); and the original deed ought to be proved to have been duly executed (3), unless proof of the execution would be dispensed with, if the original itself were produced, or unless the want of the original is occasioned by the default of the other party, in which case, the execution may reasonably be presumed against him. So where an original note of hand is lost, a copy cannot be read in evidence, unless the note is proved to be genuine. (4)

The loss of a deed, by time and accident, or by any other casualty, is a sufficient reason for dispensing with a profert in pleading, when otherwise a profert might be necessary (5); or it may be pleaded, that the deed is in the hands of the opposite party, or destroyed by him (6). But

(1) R. v. West Riding of Yorkshire, Easter term, April 17. 1815. MS.

(2) Bull. N. P. 254. R. v. Castleton, 6 T. R. 236.

(3) R. v Sir T. Culpepper, Skinner, 673. per Holt C. J.

(4) Per Ld. Hardwicke C. J. Goodier v. Lake, 1 Atk. 446.

(5) Read v. Brookman, 3 T. R. 151. Bolton v. Bp. of Carlisle, 2 H. Black. 259.

(6) Totty v. Nesbitt, 3 T. R 153. n. (c).

if

if the plaintiff, instead of declaring upon the deed, as lost or destroyed, inadvertently pleads with a profert, and the defendant pleads non est factum, the plaintiff will not be allowed to prove the loss at the trial, and must be non-suited (1). In such a case, the plaintiff should move to put off the trial, or may withdraw the record, and amend the pleadings, stating the circumstances to excuse the profert. (1)

Proof of execution.

When a deed is produced in evidence, the next step is to prove it duly executed. In a few cases, however, proof of execution will not be necessary; as,

Exceptions. 1. Deeds 30 years old.

First, If the deed is thirty years old, it may be admitted in evidence without any proof of its execution; and the same rule applies generally to deeds concerning lands, to bonds (2), receipts (3), and all ancient writings. Some account, however, says Mr. Justice Buller, ought to be given of the place, where the deed was found (4); and in another book it is said, that "ancient writings, which are proved to have been found among deeds of evidences of land, may be given in evidence, although the execution cannot be proved; for it is hard to prove ancient things, and the finding them in such a place is a presumption, that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty. (5)

This observation, on the necessity of shewing where the deed was found, seems to apply more particularly to those cases, where the character and authenticity of old writings depend in some degree on the nature of the place or custody in which they have been kept. This is the case with terriers, ecclesiastical surveys, court rolls, and other muni-

(1) Smith and others v. Woodward, 4 East, 585.

(2) Governor of Chelsea Waterworks v. Cowper, 1 Esp. N. P. C. 275.

(3) Fry v. Wood, 11 G. 2. K. B. 1 Selw. N. P. 492.

(4) Bull. N. P. 255.

(5) Vin. Ab. tit. Evidence, (A. b. 5.), cited 7 East, 291. And see Forbes, Administrator of Henchett, v. Wall, cited by Ld. Kenyon, 1 Esp. N. P. C. 278.

ments

ments of manors, which ought to be produced each from its proper repository; and if they have been regularly preserved, it will not be necessary, after a certain lapse of time, to prove them genuine. For the same reason, old grants to abbeys have been rejected as evidence of private rights, because the possession of them did not appear to be connected with any persons, who had an interest in the estate (1). But, in common cases, where the written instrument itself purports to belong to the party, who produces it in evidence, it will be admitted without proof of the execution, and without shewing where it has been kept, provided it is of sufficient age and in other respects admissible evidence against the opposite party. On a question of settlement, therefore, where the respondents produced a certificate, more than thirty years old, which had been granted to their parish by the appellant parish, the court of King's Bench held, that the mere production of it was sufficient, and that the respondents were not obliged to shew, that the certificate had been kept in the parish chest (2). It would be sufficient, if the certificate were to be produced by a rated inhabitant of the parish (3). So, in an action for a false return to a mandamus, a corporator may produce the muniments of the corporation. (4)

If there is any blemish in the deed by rasure or interlineation, the deed ought to be proved though above thirty years old (5), and the blemish satisfactorily explained. In such a case, the jury would have to try, whether the rasure or interlineation was before or after the delivery of the deed; for, if the rasure was before that time, the deed is still valid and binding; it is only after the delivery, that a rasure or interlineation can affect a deed, and, even then, they are in some cases immaterial. Now, to ascertain the time of delivery, the first and best evidence, to be resorted to,

(1) See ante, p. 317.
(2) R. v. Ryton, 5 T. R. 259.
(3) R. v. Netherthong, 2 Maule & Selw. 337; previous to the late act of parliament, which makes rated inhabitants competent in such a case.
(4) 2 Maule & Selw. 338.
(5) Gilb. Ev. 89. Bull. N. P. 255.

to, is the testimony of a subscribing witness, if any can be produced; or, if there is no subscribing witness, other persons may be called, who were present when the deed was delivered; or, if no person was present, the time of delivery will be reckoned from the date of the deed; and the fact, of the rasure being after the delivery, may be proved either by a subscribing witness, or by any person, who saw the rasure made.

The rule, that deeds of thirty years standing prove themselves, is so well established, that even if a subscribing witness were alive, and in a state to be produced, it has been thought unnecessary to call him for proving the execution. Lord Kenyon is reported to have said (1), that he remembered a case before Mr. Justice Yates, in which, a deed of that age being produced in evidence, it appeared that the subscribing witness was then actually in court, but he declared he would not break in upon a rule of evidence so well established, (by requiring the subscribing witness to be called,) and admitted the deed without further proof. But in the case of Rees v. Mansel (2), Mr. Baron Perrott held, that, although a deed may be read in evidence on account of its antiquity, yet, if on the other side it is shewn that one of the witnesses is alive, he must be produced, or the deed must be rejected; and he cited a case where a deed was produced in the King's Bench, and it appeared that Sir Joseph Jekyll was a subscribing witness, upon which the court said, they knew he was alive, and that if he did not come to prove it, the plaintiff must be nonsuited. It was then mentioned to have been ruled by Mr. Justice Yates, that, for the sake of practice, the witness should not be allowed to prove an old deed, even if he attended for that purpose; but Mr. B. Perrott retained his opinion; "An old deed (he said) is admitted only on a presumption, that the witnesses are dead, but when the contrary is made to

(1) March v. Collnett, 2 Esp. N. P. C. 665.

(2) Selw. N. P. 492.

appear,

appear, they must be called." If, indeed, the rule is founded on the presumption of the attesting witness's death, then it seems to follow, that, where that presumption is contradicted by the fact of his being still alive, the execution of the deed ought to be regularly proved, as in ordinary cases. But if courts of law have adopted the rule, not on the presumption of a fact, (which would be for the consideration of the jury rather than of the court,) but as a general maxim of law, on account of the great difficulty of proving execution after an interval of many years, and have therefore fixed a limit, beyond which the proof of execution will not be required, there appears to be no inconsistency in acting generally upon this principle, though in a particular case the subscribing witness may be proved to be alive, at the same time leaving it to the opposite side to dispute the regularity of the execution by calling him or any other witness.

2. Deeds enrolled.

Secondly, Deeds enrolled have been admitted without proof of execution (1). On this subject, Ch. B. Gilbert makes the following distinctions: "Where a deed needs enrolment," (as deeds of bargain and sale, by statute 27 Hen. VIII. c. 16.) "there the enrolment is the sign of the lawful execution of such deed, and the officer, appointed to authenticate such deeds by enrolment, is also empowered to take care of the fairness and legality of such deeds, and therefore a copy of such enrolment must be sufficient; for when the law has appointed them to be made public acts, the copy of such public acts shall be a sufficient attestation (2). But where a deed needs no enrolment, there, though it be enrolled, the inspeximus of such enrolment is not evidence, because, since the officer has no authority to enrol them, such enrolment cannot make them public acts, and consequently cannot entitle the copy of them to be given in evidence; for then, if the

(1) Com Dig. tit. Evidence, (B. 2), citing 1 Salk. 281.

(2) Gilb. Ev. 86. 1 Keb. 117. 1 Salk. 281.

deed

deed were doubtful, it were but to enrol it, and bring the copy or inspeximus in evidence, and thereby avoid producing a deed that was any way suspicious." (1)

Mr. Justice Buller, after citing the rule from Chief Baron Gilbert, (that deeds of bargain and sale, enrolled and requiring enrolment, may be given in evidence without proof of the execution,) observes (2), that " the law " may well be doubted, notwithstanding that such deeds " of bargain and sale enrolled have frequently in trials at " nisi prius been given in evidence without being proved. " In support of this practice," he adds, " the case of " Smartle v. Williams (3) is much relied on; but that " case is wrong reported, for it appears from the report in " Levinz (4), that the acknowledgment was by the bar- " gainor, and so is stated in Salkeld's manuscript; be- " sides it appears from both the books, that it was only a " term that passed, and consequently it was not an enrol- " ment within the statute." Mr. Justice Buller then cites a case from Styles' Reports (5), where Glyn C. J. is reported to have said, that " if divers persons seal a deed, and but one of them acknowledge the deed, and the deed is thereupon enrolled, this is a good enrolment, and may be given in evidence at a trial, as a deed enrolled." " But " it would be of very mischievous consequence," observes Mr. Just. Buller " to say, therefore, that a deed, enrolled " upon the acknowledgment of a bare trustee, might be " given in evidence against the real owner of the land, " without proving it executed by him. However, that " has been the general opinion, and it seems fortified in " some degree by statute 10 Ann. c. 18. On the other " hand, it seems as absurd to say, that a release which has " been enrolled upon the acknowledgment of the releasor " shall not be admitted in evidence against him, without

(1) Gilb. Ev. 86. 1 Keb. 117.
(2) Bull. N. P. 256.
(3) 1 Salk. 280.
(4) 3 Lev. 387. S. C.
(5) Thurle v. Madison, Styl. 462.

"being proved to be executed, because such release "does not need enrolment; and in fact such deeds have "often been admitted; and that was the case of Smartle "v. Williams; the deed there did not need enrolment, "yet being enrolled on the acknowledgment of the "bargainor, it was read against him without being "proved."

In the case of Smartle v. Williams, an examined copy of the enrolment of a deed of bargain and sale, by which a term of years was assigned, was offered in evidence without any proof of the bargainor's sealing and delivery. It was objected, that the copy of the deed enrolled was not evidence, because the interest assigned, being only a term, passed immediately, and the enrolment afterwards is no more than an enrolment of an obligation: but the court overruled this objection, and held, that "the acknowledgment of the deed by the lessor before the master in Chancery is good evidence against himself, and against all who claim under him (1)." So, in the case of Lady Holcroft v. Smith (2), a distinction was made between deeds of bargain and sale, (enrolled in pursuance of the statute of Henry VIII.), and other deeds enrolled, and it was held that a copy of a deed, enrolled for safe custody, would not be evidence otherwise than against the party, who sealed it, and all claiming under him. It does not appear from any of the authorities cited by the Chief Baron Gilbert, (excepting the case of Smartle v. Williams,) against what party the copy of the enrolment was offered in evidence. If the enrolment had been on the acknowledgment of the bargainor, and offered as evidence against him, there cannot be a doubt of its being admissible.

With regard to a copy of the enrolment of a deed of bargain and sale, indented and enrolled in pursuance of the statute of Henry VIII., it is enacted by statute 10 Ann.

(1) 3 Lev. 387.

(2) 2 Freeman. 259. 1702. in Chanc.

c. 18. s. 3. (1) "(for supplying a failure in pleading or deriving title to lands, &c. conveyed by such deeds of bargain and sale, where the original indentures are wanting,) that, where in pleading any such indenture shall be pleaded with a profert, the party so pleading may shew forth and produce a copy of the enrolment; and such copy, examined with the enrolment, and signed by the proper officer having the custody of the enrolment, and proved upon oath to be a true copy, shall be of the same force and effect, as the indenture of bargain and sale would be, if produced." Before this statute, an enrolment of the deed could not have been pleaded; and though a deed had been exemplified under the great seal, yet it was necessary, at common law, to shew forth the deed itself under seal, and not the exemplification (2). So, by the common law, a constat or inspeximus of the king's letters patent could not have been shewn forth in court, but the letters patent themselves: but by statute 3 & 4 Ed. VI. c. 4. explained by stat. 13 Eliz. c. 6. "patentees, and persons claiming under them, may make title in pleading by shewing forth an exemplification of the enrolment of the letters patent, as if the letters patent themselves were pleaded and shewn forth;" and now they are to be given in evidence in the same manner, as if they were pleaded. (3)

The rule, concerning copies of enrolments, appears then to be, that a copy of the enrolment of a bargain and sale of freehold in lands, &c. is as good evidence as the original itself (4); but that a copy of the enrolment is not evidence of a bargain and sale of a chattel interest, or of the contents of any other deed enrolled for safe custody, except as against the party acknowledging the deed; and that against such party, and against all claiming under him, a copy of the enrolment of any deed is admissible in evidence.

(1) See also stat. 8 G. 2. c. 6. s. 22. (concerning deeds of bargain and sale of lands, in the North Riding of Yorkshire).

(2) Co. Lit. 225. b.

(3) Olive v. Gwyn, Hardr. 119.

(4) See 14 East, 231. and Hobhouse v. Hamilton, 1 Schoal. & Lefr. 207.

3. Recital in a deed.

Thirdly, the recital of a deed in another deed is evidence against the party, who executed the reciting deed, or against any person claiming under him; and it will not be necessary, in such a case, to prove the execution of the recited deed; but proof of the execution of that, which recites the other, will be sufficient; for, the party, and those claiming under him, are estopped by the recital (1). Thus, the recital of a lease in a deed of release is good evidence of such lease against the releasor, and those who claim under him (2). So where a party by his deed covenanted to lay out a sum of money in an annuity, and recited in the deed, that he had given a bond for the payment of the money, the recital was held to be sufficient evidence of the bond; for it was a confession by the obligor himself, and stronger than a verbal confession, being under his hand and seal (3). But a recital cannot operate as an estoppel against third persons who are neither parties nor privies to the reciting deed, and will not be evidence of the contents of the recited deed (4). If the recital can be proved a correct copy, it is scarcely necessary to observe, that it will be admissible like any other examined copy, where secondary evidence of a deed can be admitted.

4. Deed produced by rule of court.

Lastly, a deed may be given in evidence, under a rule of court, without proof of execution; for the consent is conclusive, and the jury are to try only such facts as are in issue between the parties. (5)

Proof of execution.

The cases above stated have been mentioned as exceptions; for the general rule is, that a deed cannot be given in evidence without proof of its execution. The execution of every instrument, that is attested, whether under seal or not, ought to be proved by a subscribing witness, if he can be produced, and is capable of being examined. The subscribing

(1) Com. Dig. tit. Evidence, (B. 5), Fitzgerald v. Eustace, Gilb. Ev. 87.
(2) Ford v. Grey, 1 Salk. 285.
(3) Marchioness of Annandale v. Harris, 2 P. Wms. 432. per Ld Chan. King. See also Shelley v. Wright, Willes, 11. and Com. Dig. tit. Estoppel, (A. 2).
(4) 1 Salk. 285.
(5) 1 Siderf. 269. Gilb. Ev. 91.

scribing witness alone is competent to prove the execution, because he may be able to state the time of the execution and some circumstances of the transaction, which may be material and unknown to other persons. On an indictment therefore against an apprentice for enlisting himself in the army, all the judges held, that the indenture of apprenticeship could not be proved by the master, but that it was necessary to call one of the subscribing witnesses. (1)

This rule is so strictly observed, that an acknowledgment of the obligor himself, admitting that he executed a bond (2), and even an admission by the defendant in an answer to a bill filed against him for a discovery (3), will not dispense with the testimony of the subscribing witness; for though the party may acknowledge the bond, yet he may not know every circumstance attending the execution; "a fact may be known to the subscribing witness, not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction (4)." The rule is precisely the same, whether the acknowledgment is offered as evidence against the party himself who made it (5), or against a third person (6); or, whether the deed is an existing instrument, or cancelled (7); or whether it is the foundation of the action, or comes in collaterally as part of the evidence in the cause (8). And this rule applies equally to all written instruments, which are attested. If, for example, an attested notice to quit has been given to the defendant, which it becomes necessary to prove in an action of ejectment, the execution must be proved by the attesting witness; and the circumstance, that the defendant read the notice and made no objection to it, cannot vary the case (9).

(1) R. v. Jones, East, Pl. Cr. 822. 1 Leach. Cr. C. 208. S. C.

(2) Abbot v. Plumbe, 1 Dougl. 216. cited by Lawrence J. 7 T. R. 267., and 2 East, 187.

(3) Call v. Dunning, 4 East, 53. See Bowles and another, Assignees of Jones, v. Longworthy, 5 T. R. 366.

(4) Per Le Blanc J. 4 East, 53.

(5) 4 East, 53.

(6) 1 Doug. 216.

(7) Breton v. Cope, Peake N. P. C. 30.

(8) Manners q. t. v. Postan, 4 Esp. N. P. C. 239.

(9) Doe dem. Sykes v. Durnford, 2 Maule & Selw. 62.

In all these cases, the attesting witness ought to be called to prove the execution, if he can be produced. If, indeed, a party to the suit agrees, that the other party should act upon the instrument, as if the witness himself had been produced, that would dispense with his testimony. (1)

The subscribing witness is to prove the delivery of the deed, or, if the writing is not under seal, the hand-writing of the party. It is not absolutely necessary that the witness should see the party sign or seal; if he sees him deliver it already signed and sealed, or merely sealed, as his own deed, it will be sufficient. Signing is not an essential part of a deed at common law; but it has been required in some cases by act of parliament, particularly by the statute of frauds (2), which expressly directs a signing in all grants of a freehold estate in lands, and in some other species of deeds; in which, therefore, signing seems as necessary as sealing.

Signing is sometimes made necessary to the execution of a power, by the express words of the deed which creates the power; and, in such cases, if attestation of the signature is required, an attestation merely of the sealing and delivery will not be sufficient. Thus, in the case of Wright v. Wakeford (3), where a power was created to be executed by trustees, with the consent of the cestui que trusts, testified by *writing under their hands and seals, attested by two or more credible witnesses*, but the attestation expressed only, that the deed had been *sealed and delivered* by the cestui que trusts and the other parties in presence of the subscribing witnesses, the majority of the court of Common Pleas determined, that the power had not been duly executed; for the question is to be determined by the true construction of the terms of the attestation, and by that alone; and the word "sealed," according to its true acceptation and

(1) Laing v. Raine, 2 Bos. & Pull. 85.

(2) St. 29 C. 2. c. 3. s. 1.

(3) 4 Taunt. 214; Mansfield Ch. J. dissenting. 17 Ves. 454. S. C.

ordinary

ordinary sense, cannot be considered as implying, that the parties, who put their seals to the instrument, put also their hands to it, or signed it in the presence of the witnesses. It was further determined in this case (1), that a subsequent attestation, indorsed upon the instrument after the death of one of the cestui que trusts, and expressing that the parties had also *signed* in the presence of the subscribing witnesses, would not cure the original defect; on the ground, that the attestation, to constitute a due and effectual execution of the power, ought to make a part of the same transaction with the signing and sealing, such being the usual and common way of attesting the execution of all instruments requiring attestation. So in the late case of Doe on the demise of Mansfield v. Peach (2), where the power was directed to be executed " by any *deed or writing under the hands and seals* of the parties to be by them duly executed in the presence of, and *attested by, two or more witnesses*," and the attestation was only of the sealing and delivery, the court of King's Bench were of opinion, that, in order to make a due execution of the power in this case, the instrument ought to be made with all the forms required by the power, and that there must also be an attestation of its execution with all those forms; and with respect to the second point, which arose here as well as in the case of Wright v. Wakeford, the Court said, it was not necessary to determine at what precise time the attestation must be made, but that the attestation subsequent to the death of one of the parties could not give to their act an operation, which it never had during the lives of the parties. Where, however, the deed creating the power directed, not, that the instrument should be *attested* by witnesses, but, that the power should be executed by *any writing, to be signed and sealed in the presence of two or more witnesses*, and the deed in pursuance of the power was expressed to be executed in the presence of the witnesses, but the attestation applied only

(1) See also 17 Ves. 457.

(2) May 21. 1814, 2 Maule & Selw. 576.

to the sealing and delivery, the Chancellor was of opinion, that in such a case it might be properly left to the jury to presume, that the deed was signed, as it professed to be, in the presence of the witnesses, who attested the sealing and delivery (1).

In consequence of the decisions in the cases of Wright v. Wakeford and Mansfield v. Peach, (which might affect the titles of purchasers, in case the fact of signature were not expressed in the memorandum of attestation,) an act of parliament has been lately introduced (2), which enacts, "that every deed or other instrument, *already made*, with the intention to exercise any power, authority, or trust, or to signify the consent or direction of any person, whose consent or direction may be necessary to be so signified, shall, if duly signed and executed and in other respects duly attested, be, (from the date thereof, and so as to establish derivative titles,) of the same validity and effect, and proveable in the like manner, as if a memorandum of attestation of signature, or of being under hand, had been subscribed by the witness; and the attestation, expressing the fact of sealing and delivering, without expressing the fact of signing or any other form of attestation, shall not exclude the proof or the presumption of signature."

Sealing is essential to a deed, but it is not material with what seal it is sealed; and any number of parties may use the same seal (3); or, one may seal for the rest with their consent, and the deed will be as binding, as if every one had put his several seal (4). Thus, where one of two defendants, in the presence of the other and by his authority, executed a bill of sale for them both, the two defendants being partners in the transaction, but there was only one seal, and it did not appear whether the seal had been put twice upon the wax, the Court of King's Bench held, that

(1) M'Queen v. Farquhar, 11 Ves. 467. 17 Ves. 458.
(2) St. 54 G. 3. c. 168.
(3) Perkins, ch. 2. s. 134.
(4) 4 T. R. 314., and see (3).

no

no particular mode of delivery was necessary; and that it was sufficient, if a party executing a deed, treated it as his own. The report adds, that the court relied principally on the circumstance, that the deed had been executed by one defendant for himself and the other, *in the presence of the other* (1). If a bond, executed abroad, is declared upon in the usual form, as a deed made and sealed by the defendant, and the instrument on being produced appears not to have a seal but instead of it a penmark of a particular kind, evidence is admissible to shew, that it is the custom of the country to execute bonds in this manner. (2)

With regard to the delivery, no particular form or ceremony is necessary: it will be sufficient, if a party testifies his intention in any manner, whether by action or by word, to deliver or put it into the possession of the other party; as, if a party threw the deed upon a table, with the intent that it may be taken by the other, who accordingly takes it; or, if a stranger deliver it with the assent of the party to the deed (3). If the deed is made by a corporation, actual delivery is not required; and fixing the common seal, that is, the corporate seal, or any other used for the occasion (4), is tantamount to a delivery; but if the corporate body had given a letter of attorney to deliver, the deed is not their's till delivery. (5)

It has been before mentioned, that proof of delivery, without any proof of signing or sealing, will be sufficient evidence of execution; for the party by delivering a deed, purporting to be his own, adopts the seal and the signature. But, under particular circumstances, less evidence has been admitted to prove the execution. Thus, in a case where it appeared that the defendant, a few minutes after having executed the deed, brought it to the witness in an

(1) Ball v. Dunsterville and another, 4 T. R. 313.

(2) Adam v. Kerr, 1 Bos. & Pull. 360.

(3) Com. Dig. tit. Evidence, (A. 3), Co. Lit. 36. a. [Note 223.]

(4) Perkins, c. 2. s. 132.

(5) Co. Lit. 36. a. [Note 222.]

adjoin-

adjoining room, and desired him to attest it; another attesting witness was still in the room, where the deed had been executed; and it was further proved, that the witness was acquainted with the defendant's hand-writing, and that the defendant knew of his being acquainted with it, and that the defendant had acknowledged the instrument; but there was no proof of the act of delivery, and no reason was shewn, why the other attesting witness could not be called to prove the delivery; in this case the Court of Common Pleas was of opinion, that the whole might be considered as one transaction, and that there was sufficient proof of the execution. (1)

If a deed, or other written instrument, is attested, but none of the witnesses are capable of being examined, the course then is to prove an attesting witness's hand-writing; and this will be a sufficient proof of the execution; as, where the attesting witness is dead — or blind (2) — or incompetent to give evidence, either from insanity (3), or from infamy of character (4), or from interest acquired after the execution of the deed (5) — or where the subscribing witness is absent in a foreign country (6), or out of the jurisdiction of the superior English courts, so as not to be amenable to their process (7) — or where he cannot be found after strict and diligent inquiry (8) *. The handwriting

(1) Parke v. Mears, 2 Bos. & Pull. 217. Powel v. Blacket, 1 Esp. N. P. C. 96. Grellier v. Neale, Peake N. P. C. 146

(2) Wood v. Drury, 1 Ld. Raym. 734. per Holt C. J.

(3) Vin. Abr. tit Evidence, (T. b. 48) pl. 12. Burnett v. Taylor, 9 Ves. jun. 381.

(4) Jones v. Mason, 2 Stra. 833.

(5) Goss v. Tracey, 1 P. Wms. 287, 9. Godfrey v. Norris, 1 Stra. 34. Swire v. Bell, 5 T. R. 371.

(6) Coghlan v. Williamson, 1 Doug. 93. Wallis v. Delancey, 7 T. R. 266. (c). Adam v. Kerr, 1 Bos. & Pull. 361.

(7) Prince v. Blackburn, 2 East, 250. 1 Bos. & Pull. 361.

(8) Anon. case, 12 Mod 607, per Holt C. J. 7 T. R. 266. Cunliffe v. Sefton, 2 East, 183. Crosby v. Percy, 1 Taunt. 365. Parker v. Hoskins, 2 Taunt. 223. Wardel v. Fermor, 2 Campb. 282.

* In the case of Cunliffe v. Sefton, (2 East, 183.) it was proved that diligent inquiry had been made after one of the attesting witnesses to a bond, at the residence of the obligor and obligee, without being able to obtain any intelligence of such

writing of the attesting witness is evidence of every thing on the face of the instrument; the sealing and delivery will be presumed; and it will not be necessary to prove the hand-writing of the party to the deed. (1) *

But, in cases, where there is no subscribing witness on the deed — or, where the subscribing witness denies having any knowledge of the execution, (which is the same thing as if there were no witnesses at all (2),) — or, where the name of a fictitious person is inserted (3) — or, where the attesting witness was interested at the time of the execution of the deed, and continues so at the time of the trial (4); — or, where the person, who has put his name as sub-

(1) Prince v. Blackburn, 2 East. 250. Adam v. Kerr, 1 Bos. & Pull. 360. Wallis v. Delancey, 7 T. R. 266. (c), Ld. Kenyon contrà.

(2) Grellier v. Neale, Peake. N. P. C. 145., ruled by Ld Kenyon. Ley v. Ballard, 3 Esp. N. P. C. 173, by Ld. Kenyon. Fitzgerald v. Elsee, 2 Campb. 635., by Lawrence J. Lemon v. Dean, ib. 636. n. by Le Blanc J. (in the case of a promissory note). See also Blurton v. Toon, Skin. 639. Abbot v. Plumbe, 1 Doug. 216. Burrows v Lock, 10 Ves. jun. 474. — Phipps v. Parker, 1 Campb. 412. contrà.

(3) Fasset v. Brown, Peake N. P. C. 23.

(4) Swire v. Bell, 5 T. R. 371.

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such a person; this was considered a sufficient ground for letting in proof of the hand-writing of the other attesting witness, who had since become interested as administratrix to the obligee, and was a plaintiff on the record. In the case of Crosby v. Percy (1 Taunt. 365.), the court of Common Pleas held, that proof of the hand-writing of an attesting witness had been properly admitted, after proof that diligent inquiry had been made for him at his usual place of residence, where, in answer to the inquiry, information was received, as also from the father of the attesting witness, that he had absconded to avoid his creditors, and was not to be found. In the last case cited, of Wardel v. Fermor (2 Campb. 282.), evidence of the hand-writing was admitted, on proof that, twelve months before, a commission of bankrupt had been sued out against the subscribing witness, who had not appeared at the time fixed for his surrender. It is not possible, by any general rule, to ascertain precisely in what cases this proof of the subscribing witness's hand-writing will be admitted. Each case must depend upon its own peculiar circumstances. But in all cases it ought to be satisfactorily proved, that a reasonable, honest, and diligent inquiry has been made, without any evasion, and without any design to overlook the witness.

* In the case of a deed executed in the East Indies, and attested by a witness resident there, the stat. 26 G. 3. c. 57. s. 38. enacts, "that it shall be sufficient to prove the hand-writing of the party to the deed, and of the attesting witness, and that the witness is resident in the East Indies."

scribing

scribing witness, did so without the knowledge or consent of the parties (1); — or if, after diligent inquiry, nothing can be heard of the subscribing witness, so that he can neither be produced himself, nor his handwriting proved; or if, at the time of the execution, he was of such an infamous character, as to make him incompetent to give evidence: in these cases, the execution may be proved, by proving the handwriting of the party to the deed; or, by any person present at the execution, though he is not endorsed as witness (2); or, by proof of an admission of the party himself that he executed the deed. And proof of the party's handwriting is a sufficient ground for presuming, that the deed was, as it purports to be, sealed and delivered. (3)

Proof of hand-writing.

The simplest and most obvious proof of handwriting is the testimony of a witness, who saw the paper or signature actually written. But a great variety of cases must continually occur, where such a direct kind of evidence cannot possibly be procured. The writing may be secret, as must constantly happen in cases of a fraudulent or criminal nature; or, if any person was present, he may be dead or unknown. In this deficiency of positive proof, the best evidence, which the nature of the case admits, is the information of witnesses acquainted with the supposed writer, who, from seeing him write, have acquired a knowledge of his handwriting: for in every person's manner of writing there is a certain distinct prevailing character, which may be easily discovered by observation, and, when once known, may be afterwards applied as a standard to try any other specimens of writing, whose genuineness is disputed. A witness may therefore be asked, whether he has seen a particular person write, and afterwards, whether he believes the paper in dispute to be his handwriting. This course of examination evidently involves two questions; first,

(1) M'Craw v. Gentry, 3 Campb. 232. 4 Taunt. 220.
(2) Com. Dig. tit. Evidence; (B.3).
(3) Grellier v. Neale, Peake N.P.C. 145. Burrows v. Lock, 10 Ves. jun. 474.

whether

whether the supposed writer is the person of whom the witness speaks, and secondly, if he is the person, whether he wrote the paper in dispute. The first is a question of identity; the second a question of judgment, or a comparison in the mind of the witness between the general standard and the writing produced.

This kind of evidence, like all probable evidence, admits of every possible degree from the lowest presumption to the highest moral certainty. It may be so weak as to be utterly unsafe to act upon, or so strong as in the mind of any reasonable man to produce conviction. The witness may have been in the constant habit of seeing him write, day after day, for years together, on common transactions, and in the course of important business; and what better means can he have of gaining the most accurate knowledge of his manner of writing? On the other hand, it may be found perhaps on enquiry, that he has seen him write only a few words, many years ago, or only once; or the specimens, which he saw, were perhaps slight and imperfect, made in a hurry, at distant intervals, or from some other cause were not the fair average specimens of his general style of writing, but deviations from the common form; in which cases, the impression on the mind of the witness will be faint and inaccurate. But whatever degree of weight his testimony may deserve, which is a question exclusively for the jury, it is an established rule, that if he has seen the person write, he will be competent to speak to his handwriting. (1)

On the trial of Algernon Sidney, as appears from the printed report of that case (2), three witnesses were called to prove a paper to be his hand-writing: the first said he had seen the prisoner write the indorsement upon several

(1) Lord Preston's case, 4 St. Tr. 446, 7. Francia's case, 6 St. Tr. 70. Layer's case, 6 St. Tr. 275. R. v Dr. Hensey, 1 Burr. 644. And see Eagleton and Coventry v. Kingston, 8 Ves. jun. 438. 474.

(2) 3 St. Tr. 802.

bills

bills of exchange, and that he believed the paper to have been written by him: this evidence was objected to as a comparison of handwriting, but admitted: the second witness said, he had not seen the prisoner write more than once, but that he had seen his indorsement upon bills, and that the paper was very like it: the third witness said, he had seen several notes, which had come to him with the indorsement of the prisoner's name, and that he had paid them, and had never been called to account for mispayment: the whole of this evidence was received. The prisoner, in his defence, still insisted that nothing but the comparison of handwriting had been offered as proof against him; and the act of parliament, which reversed his attainder, states the admission of this evidence as one of the grounds of the illegality of his conviction. That act recites, among other particulars, that "that there had not "been sufficient legal evidence of any treasons committed "by him, there being produced a paper found in his closet "supposed to be his handwriting, which was not proved "by any one witness to have been written by him; *but the "jury was directed to believe it, by comparing it with other "writings of his* (1)." However, if the printed report of the trial is correct, something more than the mere comparison of handwriting was laid before the jury; for, according to that report, the first witness had seen the prisoner write his name several times. And, though it may be objected to the testimony of the two last witnesses, that the indorsements, mentioned by them, were not sufficiently proved to have been written by the prisoner, that objection will not apply to the other witness, whose evidence was certainly admissible. The same kind of evidence was admitted in Lord Preston's case within a year after the reversal of Sidney's attainder, and has been since received in many cases of great authority. (2)

(1) Cited in Layer's case, 6 St. Tr. 279.

(2) See also the case of De la Motte, 1781, in vol. 21. of Howell's New Coll. of St. Tr. 810.

Another

Another method of acquiring a knowledge of hand-writing is by means of a written correspondence. If a witness has received letters, purporting to have been written by a particular person, on subjects of business, or of such à nature as makes it probable, that they were written by the hand from which they profess to come, he may be admitted to speak to that person's hand-writing. The same questions occur here, as have been before mentioned in the case, where a witness speaks from having seen the person write; and in addition to these, one other question arises, concerning the identity of the person who wrote the letters; and the admissibility of the evidence must depend upon this, whether there is good reason to believe, that the specimens, from which the witness has derived his knowledge, were written by the supposed writer of the paper in question. If this point is clearly proved, the witness, who has received the letters, will frequently be able to give more satisfactory evidence than one who has seen the person in the act of writing; for the latter may have seen him write but seldom, or on occasions which were not likely to excite attention; while the other may have had frequent opportunities of re-perusing the letters, and the letters themselves, having been written on subjects of business, will probably have more consistency, and exhibit a fairer specimen of the general character of hand-writing.

The first reported case, in which the admissibility of this kind of evidence appears to have been decided, is the case of Lord Ferrers v. Shirley, which is thus stated in Fitzgibbon's Reports (1). "Upon a feigned issue out of Chancery, directed to be tried at bar, whether a deed, pretended to have been executed by the Earl Ferrers in the year 1683, was his deed or not, several witnesses were called to swear to the hand-writing of the subscribing witnesses then dead, and amongst others, one J. J., who would

(1) P. 195.

have

have sworn to the name of J. Cottington, whose name was on the deed as a witness, because he had seen several letters written by Cottington; thereupon he was asked whether he had ever seen Cottington write; to which he answered, that he never did, nor ever saw the person that wrote the said letters, but that his master, (to whom the letters were written for the rent of a part of the estate of the late Earl Ferrers, which his said master held,) informed him they were the letters of Cottington, the Lord Ferrers's steward, who was the person pretended to have attested the deed in question. It was hereupon objected to his testimony, because he could not say with any certainty, whether or not the writer of the letters was the same person that attested the deed; for Cottington, who was supposed to write the letters, might get some other person to write those very letters for him; and the counsel insisted, that in all cases, where a witness would swear to handwriting, he must be able to say, that he saw such person write. The court rejected the witness, because he could not ascertain the identity of the person. But Lord Raymond said, "It was not necessary in all cases that the witness should have seen the person write, to whose hand he swears; for where there has been a fixed correspondence by letters, and that it can be made out that the party writing such letters is the same man that attested a deed, that will entitle a witness to swear to that person's hand, though he never saw him write." Page J. said, "If a subscribing witness to a deed lives in the West Indies, whose handwriting is to be proved in England, a witness here may swear to his hand, by having seen the letters of such person, written by him to his correspondent in England, because under the special circumstances of that case, there is no other way, or at least the difficulty will be great, to prove the handwriting of such subscribing witness." But Lord Raymond differed, and said, "that these special circumstances could not vary the reason of the thing." It was further objected to the same witness, that he should produce the letters, that the court and the

jury

jury might be able to judge of the resemblance between the hand-writing of the letters and that on the deed; but this was over-ruled by the Court, "because the witness might well have acquired a knowledge of the character of Cottington's hand-writing, by having seen several letters written by him." The rule to be deduced from this case is, that a witness may be admitted to speak to a person's hand-writing, if he has seen letters which can be proved to have been written by him; but that this antecedent proof of the identity of the person is indispensably necessary: and further, that hearsay evidence of identity is totally inadmissible. The case, reported to have been put by Page J., is not very clearly stated. If it is understood to mean, that where a subscribing witness resides abroad, slighter proof of his signature may be given than is necessary in other cases, it certainly cannot be supported; but if the meaning is, that his signature may be proved in the same manner as if he were dead, by a witness who has seen letters proved to be of his writing, the case is warranted by many later authorities, which have been already mentioned. And with regard to the last objection, namely, that the witness ought to produce the letters, that the jury might judge of the resemblance, it appears to have been made as a preliminary objection to the admissibility of his evidence, and was therefore properly over-ruled. But after the witness has been regularly admitted to give his evidence, it seems reasonable, that the opposite party should be allowed not only to cross-examine as to the number and appearance of the writings, which the witness professes to have seen, but also to call upon him to produce the writings in court, that the jury may judge of the means which the witness had of forming his opinion.

Another authority, in support of the rule laid down in Lord Ferrers v. Shirley, is Layer's case (1), on a trial

(1) 6 St. Tr. 275. Gold v. Jones, 1 Black. Rep. 384. S. P.

for high treason, where the witness (who had received letters from the prisoner on business five years before, which he answered, and transacted the business according to the directions in the letters, and had been paid for it,) was allowed to speak to the hand-writing of a treasonable paper charged upon the prisoner; and, though the witness in this case had seen the prisoner write some years before the receipt of the letters, yet independent of that circumstance his evidence was adjudged to be admissible. If he had formed his judgment of the prisoner's hand-writing from these letters alone, "if the case had gone no further," said the Chief Justice, "nobody could have doubted but that, according to the usual course and rules of evidence, the paper ought to be read." With respect to the interval of time, that has elapsed since the witness saw the prisoner write, or received letters from him, that is a circumstance not to exclude him from giving evidence, but to be left with all the other circumstances of the case to the consideration of the jury.

This rule of evidence appears not to have been settled at the time of the memorable trial of the seven bishops, who were tried for a libel in the fourth year of James II. In the course of that trial, a witness, called to prove the signature of one of the bishops, said he had received letters from him on business, and that he had done what the letters required, and that he believed the signature in question to be the bishop's hand-writing, but could not swear that those letters were written by him (1). This was the strongest evidence in the case, excepting the proof of the archbishop's signature, which was proved by one who had seen him write. But Mr. Justice Powell thought it an objection to the evidence before mentioned, that the witness had never seen the bishop write, and that the receipt of the letters was not sufficient, unless he could also swear who had written them. A long and desultory

(1) 4 St. Tr. 338.

argument ensued on the admissibility of the paper in question, the counsel for the prosecution insisting, that the signatures of the bishops had been proved, and the counsel on the other side, that the proof was insufficient. Mr. Justice Powell said (1), "he thought the paper had "not been sufficiently proved to be subscribed by the "bishops. It is too slender a proof for such a case. I "grant you," he added, "in civil actions a slender "proof is sufficient to make out a man's hand, as by a "letter to a tradesman or a correspondent, or the like; "but in criminal causes, such as this, if such a proof is "allowed, where is the safety of your life, or any man's "life here?" The judges were equally divided in opinion, and the paper was not allowed to be read. Thus it appears, that at that time the rule of evidence, which has been mentioned, was not admitted in criminal cases, though even then it was acknowledged to be reasonable in cases of a civil nature. But this distinction is no longer made. If the rule is true in the one case, it must be equally true in the other; for the rules of evidence, which are the laws of truth, must be uniform and universal.

In the cases which have been mentioned, the proof of hand-writing is founded on a knowledge of the general character. The witness is supposed to have formed a standard in his mind, and with that standard to compare the writing in question. But no other kind of comparison will be allowed. It is an established rule of evidence, that hand-writing cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine. The reason, usually assigned, is, that unless a jury can read, they would be unable to institute a comparison, or judge of the supposed resemblance (2); a reason, however, which appears to be too narrow for a rule of such general application. Another reason, for rejecting such a comparison, — Comparison of hand-writing.

(1) P. 345.

(2) Macferson v. Thoytes, Peake N. P. C. 20. Brookbard v. Woodley, do. n. (b).

seems to be, that the writings intended as specimens to be compared with the disputed paper, would be brought together by a party to the suit, who is interested to select such writings only as may best serve his purpose, and they are not likely therefore to exhibit a fair specimen of the general character of hand-writing. It has been thought by some an inconsistency in the rules of evidence, to allow a witness to compare in his mind the disputed paper with the impression which a short and transient view of writings may have made upon his memory; yet, on the other hand, not to permit the jury to compare it with writings, proved to be authentic, present in court, and open for inspection. The only answer which occurs to this objection, is that before suggested, namely, that the writings, which are produced as specimens, having been selected by an interested party to serve a present purpose, are open to suspicion, and liable to the imputation of contrivance.

When the antiquity of a writing, purporting to bear a person's signature, makes it impossible for a witness to swear, that he has ever seen the party write, it has been held sufficient, if the witness has become acquainted with his manner of signing his name, by inspecting other ancient writings which bear the same signature, provided those ancient writings have been treated and regularly preserved as authentic documents. Thus, where a parson's book was produced to prove a modus, the parson having been long dead, a witness who had examined the parish-books in which the same parson's name was written, was permitted to swear to the similitude of the hand-writing; " for it was the best evidence in the nature of the thing, for the parish-books were not in the plaintiff's power to produce (1)." Hence it may be inferred, that if the parish-books could have been produced, they might have been brought into court, and a comparison made between those signatures and the signature in question. And this infer-

(1) Per Ld. Hardwicke in Chanc. Dec. 1746, cited in Bull. N P [236.]

ence

ence is supported by two late cases (1), in which a signature in an entry, purporting to have been made by a person long since deceased, was allowed to be compared with another signature of the same person in a deed of settlement, and this evidence by comparison was admitted, on the ground, that at such a distance of time no better evidence of the fact could be obtained. *

In a case, where the question was, whether a will had been forged, a clerk of the general post office, who had been regularly employed to inspect franks and detect forgeries, was admitted by the court of King's Bench, on a trial at bar, to speak to the general appearance of the hand-writing of the will, and to give his opinion, whether it was written in a natural or imitated character (2). The judges considered it entirely a question of art, which might be answered by a witness of skill and experience. The witness, however, in his examination, admitted that he had never detected an imitation of the hand-writing of an old person, who wrote with difficulty, and might be supposed frequently to stop; and that they judged principally by seeing, whether the letters were what they called *painted*, or passed over by the pen a second time, which might happen to any person from a failure of ink. In the same case, after the witness had proved that the will was not genuine, he was shewn a paper admitted to have been written by a

(1) Brune v Rawlins, 7 East, 282. n. (a), ruled by Le Blanc J; Morewood v. Wood, 14 East, 328. S. P.

(2) Revet v. Braham. 4 T. R. 497.

* In an earlier case, before Mr. Justice Yates, this kind of evidence was rejected. The plaintiff in that case, in support of a modus, produced a paper containing a particular of tithes, and said to be the hand-writing of the deceased rector. In order to prove that this was the writing of the rector, whose name it bore, the plaintiff's counsel offered to produce several returns of births and burials in the parish, purporting to have been made and signed by the same rector; and on comparing the signature on the returns with that on the paper, the hand-writing, it was said, would appear to be by the same person. But Mr. Justice Yates rejected the evidence. Brookbard v. Woodley, Appendix to Vin. Ab. vol. iv. 267. Peake, N. P. C. 20. S. C.

person suspected of forging the will, and was then asked, whether in his opinion that paper and the will had been written by the same person. The question was objected to, but admitted by the court; yet this was evidently a mere comparison of hand-writing, and a sort of comparison the least of all to be trusted, as it was an attempt to trace a resemblance between two papers, which the writer would endeavour to make as unlike as possible. This subject was much discussed in the case of the King v. Cator (1), tried before Mr. Baron Hotham, from which case this distinction may properly be made, namely, that persons of skill may be called to ascertain whether hand-writing is genuine, or whether it was written at interrupted strokes, like the writing of a person attempting to imitate the hand of another; but that they cannot be asked, whether the same hand, which wrote another paper, wrote also the feigned paper.

Sect. II.

Of the Proof of Wills.

By the statute of frauds (2), "all devisees of lands or tenements devisable by that statute, or by the statute of wills (3) *, or by force of any particular custom, are required

(1) 4 Esp. N. P. C. 117. 145.
(2) St. 29 C. 2. c. 3. s. 5.
(3) St. 32 H. 8. c. 1., explained by St. 34 H. 8. c. 5.

* The statutes of the 32d and 34th of Henry VIII. gave the power of devising to such persons only as held by socage, and had an estate of inheritance in fee-simple. But copyholds, not being held by socage tenure, cannot be devised under these statutes, nor are they made devisable by any clause in the statute of frauds; and they are considered to be in their nature not properly the subject of a devise, for they do not pass by a will merely as a will, but by will and surrender taken together. The practice is to surrender to the use of the owner's last will, and on this surrender the will operates as a declaration of the use, and not as a devise of the land itself. A devise therefore of copyhold lands, or of customary lands which pass by surrender and admittance, does not require any attestation; nor will

quired to be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and to be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void, and of no effect."

This clause describes the solemnities, which ought to attend the execution, and particularly adverts to the character of the witnesses and the situation of the devisor at the moment, when the act of attestation is performed. "That the statute had a main view to the quality of the witnesses," said Lord Camden in the case of Hindson v. Kersey, "will appear from this consideration, namely, that a will is the only instrument in it required to be attested by subscribing witnesses at the time of execution; while leases, marriage agreements, declarations, and assignments of trusts, were only required to be in writing and signed. These are transactions of health, and protected by valuable considerations, and antecedent treaties; but a will is often executed suddenly in a last sickness, and sometimes in the article of death; and the great question to be asked in such cases is, whether the testator was in his senses when he made the will? and consequently the time of the execution is the critical moment, which requires guard and protection. What is the employment of the witnesses? It is to inspect and judge of the testator's sanity before they attest, and, if he is not capable, they ought to refuse to attest. In other cases, the witnesses are passive, here they are active, and in truth the principal parties to the transaction. The testator is entrusted to their care (1) *." According to this reason-

(1) Hindson v. Kersey, 4 Burn. Eccl. L. 88.

will it require a signature, unless a signature is made necessary by the terms of the surrender to the use of the will. Wagstaff v. Wagstaff, 2 P. Wms. 258. Tuffnell v. Page, 2 Atk. 37. Carey v. Askew, 2 Bro. Ch. Rep. 58. Doe dem. Cook v. Danvers, 7 East, 299. 322.

* There has been a difference of opinion respecting the meaning of the term "credible," in the fifth section of the statute of frauds. Lord Mansfield thought it inaccurate, and that it had slipped into the statute as a word of course; and that the

reasoning, the credibility or competency of the witnesses (for the term "credible" is to be construed in this passage as synonimous with "competent,") must be considered with reference to the time of attestation; so that, if one of three attesting witnesses would have been incompetent to give evidence at the time of his subscribing, (as from want of reason, or from conviction of some infamous offence (1),) the will is not duly executed within the statute of frauds. Upon this principle it was determined, soon after the passing of the statute, that a devisee could not attest a will, under which he took an interest (2). But considerable doubts were afterwards entertained, whether the competency of such an interested person might not be restored by a release, payment, or extinguishment of all his interest, so as to admit him to prove the execution (3). In consequence of this difference of opinion, the legislature passed an act, which, (after reciting, that it had been doubted, who were to be deemed legal witnesses within the statute of frauds,) enacts (4), that "if any person shall attest the execution "of any will or codicil, (to whom any beneficial devise, "legacy, estate, interest, gift, or appointment affecting any "real or personal estate, except charges on land, &c. for "payment of debts, shall be given,) such devise, legacy, &c. "shall, so far only as concerns such person attesting the

(1) Pendock v. Mackinder, Willes' Rep. 665.
(2) Hilliard v. Jennings, 1 Ld. Raym. 505. Com. Rep. 91. S. C.
(3) See on this subject Anstey v. Dowsing, 2 Stra. 1253. Wyndham v. Chetwynd, 1 Burr. 414. Hindson v. Kersey, 4 Burn. Eccl. L. 88.
(4) St. 25 G. 2. c. 6. s. 1, 2. 6.

the witnesses need not be competent, as that word is understood in law, at the time of the execution. "If all the witnesses," said Lord Mansfield, "swear that the testator did not execute, if they had at the time the worst characters, and had committed the most infamous actions, yet their attestation answers the necessary form, because the testator meant to comply with the law, and might not know them to be bad men. Objections to the sufficiency of the subscribing witnesses," he added, "should be left to be judged of, as cases arise, by general principles, by analogy to the law of witnesses in other instances, and by arguments drawn from the nature and fitness of the thing with regard to justice, convenience, and the intent of the statute." Wyndham v. Chetwynd, 1 Burr. 418, 419.

"execu-

" execution, or any person claiming under him, be utterly " null and void; and such person shall be admitted as a " witness to the execution of such will or codicil, within " the intent of the said act, notwithstanding such devise, " legacy, &c. And in case any will or codicil shall be " charged with any debt, and any creditor, whose debt is " so charged, shall attest the execution of such will " codicil, every such creditor, notwithstanding such charge, " shall be admitted as a witness to the execution of such " will or codicil, within the intent of the said act: Pro- " vided always, that the credit of every such witness so " attesting the execution of any will or codicil in any of " the cases within this act, and all circumstances relating " thereto, shall be subject to the consideration and deter- " mination of the court and the jury, before whom any " such witness shall be examined, or his testimony or at- " testation made use of, in like manner, as the credit of " witnesses in all other cases ought to be considered and " determined." It had been determined, long before this act, that an executor, who took nothing under the will, and had no interest in the surplus, was a competent witness to prove the will in a cause concerning the estate. (1)

The best proof of the contents of a will is the original will itself. An exemplification under the great seal is not evidence in an action of ejectment (2); nor is the probate of a will in the spiritual court any proof of a devise of real property (3), even where the original is lost (4), for that court has no power to grant a probate of such devises, or to authenticate them on its rolls. But, where the contents of a will are given in evidence, not to establish a devise, but merely for the purpose of proving a pedigree stated in the will, the rolls of the spiritual court, which has authority to enrol, have been thought admissible (5). And similar

(1) Anon case, 1 Mod. 107.; and see Bettison v. Sir R. Bromley, 12 East, 250, where the cases are collected; and suprà, p. 40.

(2) Comberb. 46

(3) See ante, p. 299.

(4) 1 Ld. Raym. 732. See St. Legar v. Adams, 1 Ld. Raym. 731; Skinner, 174.

(5) See ante, p. 299.

evidence

evidence has been admitted, where a party to the suit had no right to the possession of the will, and could not produce the original. Thus, in an avowry for a rent-charge, where the avowant claimed under a will, which he could not produce, as it belonged to the devisee of the land, the ordinary's register of the will and proof of former payments were held to be sufficient evidence against the plaintiff, who was the devisee of the land charged (1). In such a case, however, though the party cannot produce the will, he ought to give notice to the other party to produce it. (2)

The execution of a will is to be proved by the subscribing witnesses, if they are alive and can be produced. On a trial at common law, all the circumstances may be proved by a single witness; that is, upon the supposition, that there are two others who would be allowed to give the same testimony (3). If the opposite party disputes the regularity of the execution, he may call any of the other witnesses; but a devisee will not be obliged to call the rest, if one alone can prove all the requisites to establish the validity of the will. This is the rule in courts of common law. But on a bill filed in Chancery to establish a will, the rule is, that all the witnesses ought to be examined by the plaintiff. "It is the invariable practice in Chancery," said Lord Camden in the case of Hindson v. Kersey (4), "never to establish a will unless all the witnesses are examined, because the heir has a right to proof of sanity from every one of those, whom the statute has placed about his ancestor."

The facts, to be proved by the subscribing witness, are that the devisor signed the will, or that another person signed in his presence, and by his express direction, and

(1) Anon. case, Rep. temp. Holt, 298. Ante, p. 299.
(2) See ante, p. 336.
(3) Per Lee C. J. in Anstey v. Dowsing, 2 Stra. 1254. Bull. N. P. 264.
(4) 4 Burn. Eccl. L. 93. Ogle v. Cook, 1 Ves. 177.; Townsend v. Ives, 1 Wils. 216. S. P.

that

that the witness and two others attested and subscribed in the presence of the devisor.

First, as to the signing by the testator, it is not material in what part of the will he makes his signature. The statute prescribes no particular form, and does not require him to subscribe, but simply to sign. It was therefore determined, in a case soon after the passing of the statute, that, if the testator writes his name at the beginning or on the side, the signing is sufficient (1). But where a will consisted of several distinct sheets, some of which the testator signed, and intended to sign the rest, but was not able, Lord Mansfield thought this was not a signing of the whole will (2). According to Freeman's report of the case of Lemayne v. Stanley (3), the Court said, "It is not necessary to write, for some cannot write, and their mark is then a sufficient signing; others have their name on a stamp, and that is good enough." In that case also, three judges held, that if the testator had put his seal, that would have been of itself a sufficient signing within the statute; but Levinz J. doubted, on the authority of a case in Rolle's Abridgment, where the court held, that an award, which by the submission ought to have been *signed* by the arbitrator, was not good in law, because it had been only *sealed*. Lord Raymond ruled in a case (4) at nisi prius, and Lord Holt is also reported to have said (5), that sealing was a signing within the statute. But later authorities appear to have considerably shaken this doctrine (6); and now the established rule seems to be, that sealing without signing is not a sufficient execution of the will. A bare sealing certainly cannot answer the Signing.

(1) Lemayne v. Stanley, 3 Lev. 1. Hilton v. King, 3 Lev. 86. 9 Ves. jun. 248.

(2) Right dem. Cater v. Price, 1 Doug. 241.

(3) P. 538. See also Hindson v. Kersey, 4 Burn. Eccl. L. 92. S. P. per Pratt C. J.

(4) Warneford v. Warneford, 2 Stra 764.

(5) Lee v. Libb, 1 Show. 68.

(6) Smith v. Evans, 1 Wils. 313., by Parker C. B. and the two other Barons present: Grayson v. Atkinson, by Lord Hardwicke, 2 Ves. 459.: Ellis v. Smith, 1 Ves. jun. 11., by Parker C. B., Willes C. J., and Sir J. Strange. See also 17 Ves. 458.

purposes

purposes which the legislature had in view; it cannot identify the instrument, nor does it bear, like writing, any peculiar character. "The statute," said Lord Hardwicke, in one of the cases upon this subject (1), "by requiring the will to be signed, undoubtedly meant some evidence to arise from the hand-writing; then, how can it be said, that putting a seal to it would be a sufficient signing; for any one may put a seal; no particular evidence arises from sealing; common seals are alike; no certainty or guard arises from thence."

In a late case, where it appeared that the testator was blind, the court of Common Pleas determined that it was not necessary to read over the will, previous to the execution, in the presence of the attesting witness (2). "The statute of frauds," said Mr. Justice Heath on that occasion, "only requires that the testator shall execute the will in the presence of the attesting witnesses, and, in ordinary cases, when that is done, all is done that is necessary to be done. In the case of a blind man, stronger evidence would be required than the mere attestation of signature, but in this case there was that stronger evidence, which the peculiarity of the case seems to call for. In the course of the argument sufficient attention has not been paid to the distinction between what shall be deemed a literal compliance with the provisions of the statute, and what sufficient proof to rebut any imputation of fraud. The question of fraud is for the jury entirely, and here they found the will to be a valid will."

Attestation. The subscribing witnesses are to attest the signing; but the statute does not direct that they shall see the testator sign, or that he should sign in their presence. It requires only an attestation of the signing. Now, at the time of making that act of parliament, and ever since, if a bond or deed had been signed by the party, who afterwards ac-

(1) 2 Ves. 459.

(2) Longchamp v. Fish, 2 New Rep. 415.

knowledged

knowledged it to be his hand-writing before witnesses, that was always considered to be evidence of the signing by the person executing, and a sufficient attestation by the subscribing witnesses (1); and the rule is precisely the same, where a note or declaration of trust, or any other instrument which requires a bare signing, is acknowledged before witnesses. From analogy to these cases, it has been determined in the case of wills, that the subscribing witness need not see the act of signing, but that it will be sufficient, if the testator has acknowledged to them, either to each separately or to all at the same time, that the will is his, or that the signature is his hand-writing (2). And the subscribing witnesses need not express in their attestation, that they subscribed their names in the presence of the testator; but whether they did so subscribe, is a question for the consideration of the jury, to be determined upon the evidence. (3)

The statute requires the witnesses to attest the signing and to subscribe, but does not direct that they shall be all present at the same time: and although an attestation and subscription by all the witnesses at the same time would be the best security against fraud and imposition, by making each a check upon the other, yet in the interpretation of the statute courts of law early determined, and it is now an established rule of property, that the witnesses may subscribe at several times (4). An attestation by a mark has been adjudged to be a sufficient subscription within the meaning of the statute. (5)

It is not necessary that the testator should declare the instrument, executed by him, to be his will, or that the

(1) 2 Ves. 457.

(2) Stonehouse v. Evelyn, 3 P.Wms. 253. Grayson v. Atkinson, 2 Ves. 454 Ellis v. Smith, 1 Ves. jun. 11. Addy v. Grix. 8 Ves. jun 504. Westbeech v. Kennedy, 1 Ves. & Bean. 362.

(3) Brice v. Smith, Willes Rep. 1 4 Taunt. 217.

(4) Cook v. Parsons, Prec. in Chan. 185. Jones v. Lake, 2 Atk. 177, in not. S. P., admitted in 2 Ves. 458., and in 1 Ves. jun. 14.

(5) Harrison v. Harrison, 8 Ves. jun. 185. Addy v. Grix, ib. 504.

witnesses

witnesses should attest every page, or that every page should be particularly shewn to them (1). The whole will, however, ought to be present at the time of attestation; for if a person makes a will on several pieces of paper, and there are three witnesses to the last paper, and none of them ever saw the will, this is not a sufficient execution (2). But unless there is positive proof that the entire will was not in the room, the question, whether it was so or not, is a question of fact, to be left with all the particular circumstances of the case to the consideration of the jury. (3)

The witnesses are to attest and subscribe in the presence of the testator; and as the object of this provision was to guard against fraud, and prevent the substitution of a false will in the place of the true one, the obvious meaning of the statute must be, that the testator should be in such a state of mind, and in such a situation, as to be capable of seeing the witnesses in the act of subscribing. It will not be a good execution, if the testator was in a state of insensibility (4), or if it was impossible for him to see the witnesses subscribe. "It is enough if the testator might see, it is not necessary, that he should actually see them signing: for at that rate if a man should turn his head back, or look off, that would vitiate the will (5)." But if the jury find the fact, that the testator might have seen what was passing at the time of the subscribing, then it will be presumed in favour of the attestation, that the testator actually saw what he might have seen. In one case, the testator was sick in bed, and the witnesses withdrew into a gallery, and there subscribed it, between which gallery and the bed-chamber (where the testator lay) there was a lobby with glass doors, and part of the glass was broken (6); in another case, the testator lay in bed in

(1) Bond v Seawell, 3 Burr. 1773.
(2) Per Cur. in Lea v. Libb, 3 Mod. 262. 1 Eq. Cas. Ab. 403. S. P.
(3) Bond v. Seawell, 3 Burr. 1773
(4) Cater v. Price, 1 Doug. 241.
(5) Per Cur. in Shires v. Glascock, 2 Salk. 687.
(6) Sir G. Sheers's case, cited Carth. 81.

one

one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that and the door of the testator's room were open (1); in a third case, the testatrix sat in her carriage opposite the window of her attorney's office, in which office the witnesses subscribed their names (2): in all these cases, (and in others, which might be mentioned to the same effect, differing only in their peculiar circumstances,) the execution was held to be sufficient, the material fact being proved, that the testator might have seen the attestation, if he had chosen to look.

If one of the subscribing witnesses can prove the execution, (as, that the testator signed in the presence of himself and two other witnesses, or that he acknowledged his signing to each of them, and that each of the witnesses subscribed in his presence,) this will be a sufficient proof of the will without calling the others. But if the witness, who is called, can only prove his own share in the transaction, as must happen, where the testator acknowledged his signing to the witnesses separately, the other witnesses ought in that case to be called. If they are dead, or insane, their hand-writing, and the hand-writing of the testator ought to be proved, it will then be a question for the jury, whether under the circumstances of the case it is probable, that all the formalities of the statute were regularly observed (3). The clause of attestation generally expresses, that the witnesses subscribed in the presence of the testator; but such a statement is not absolutely necessary; and though it is entirely omitted, the omission will not conclude the jury from finding that the will was so subscribed. In the case of Croft v. Pawlet (3), the attestation

(1) Davy and another v. Smith, 3 Salk. 395.

(2) Casson v. Dade, 1 Brown. Ch. C. 99. See also Doe dem. Wright and others v. Manifold, 1 Maule & Selw. 294.

(3) Hands v. James, 2 Comyns's Rep. 530. Croft v. Pawlet, 2 Stra. 1109. Brice v. Smith, Willes' Rep. 1. S. P.

was,

was, that the will had been signed, sealed, published, and declared as his last will, in the presence of the subscribing witnesses; the witnesses being dead, and their signatures proved in the common way, it was objected, that this was not an execution according to the statute of frauds; for the signatures of the witnesses could only stand as to the facts to which they had subscribed, and signing in the presence of the testator was not one; but the Court were of opinion, that this was a matter of evidence to be left to the jury, and they gave a verdict in favour of the will.

If a subscribing witness is abroad, who ought to be called if he could be produced, his hand-writing may be proved in the case of a will, as in cases on the execution of a deed. And the rule appears to be the same in courts of equity. Thus where a question arose, whether it was necessary to send out a commission to examine one of the witnesses, who was in Jamaica, Lord Alvanley, then Master of the Rolls, held that it was not necessary to have his examination, but that the case was the same, as if the witness were dead (1): the heir at law, he observed, did not make a point of it, but submitted it to the court; and he cited a case, where it was thought not only unnecessary, but very dangerous to send the will abroad. And in another case, where it was objected that one of the witnesses was abroad, Lord Chancellor Thurlow said, he doubted, whether the rule had ever been laid down so largely, as that the will could not be proved without examining all the witnesses, although that had been the practice. (2)

If a subscribing witness should deny the execution of the will, he may be contradicted, as to that fact, by another subscribing witness; and even if they all swear, that the will was not duly executed, the devisee would be

(1) Ld. Carrington v. Payne, 5 Ves. jun. 411.

(2) Powel v. Cleaver, 2 Brown. Ch. C. 504. See Grayson v. Atkinson, 2 Ves. 460.

allowed

allowed to go into circumstantial evidence to prove the due execution (1). If one of the subscribing witnesses impeach the validity of the will, on the ground of fraud, and accuse other witnesses, who are dead, of being accomplices in the fraud, the devisee may give evidence of their general good character. (2)

When the subscribing witnesses are dead, and no proof of their hand-writing can be obtained, as must frequently happen in the case of old wills, it will be sufficient to prove the signature of the testator alone. In a case (3), where the hand-writing of two subscribing witnesses was proved, and no account could be given of the third, the will being above thirty years old and the testator having been dead for twenty years, an objection was made to the proof of the will; but the Master of the Rolls said, he could not see any distinction in this respect between a will and a deed, except that the former, not having effect till the death, wants a kind of authentication, which the other has; that is, from the nature of the subject; but in this case, he added, I think the proof sufficient; for in a late case in the court of King's Bench, Cunliffe v. Sefton (4), an inquiry of the same kind was held sufficient. The Master of the Rolls therefore held, that the execution of the will had been sufficiently proved.

(1) Austin v. Willes, Bull. N. P. 264. Pike v. Badmering, cited 2 Stra. 1096. Lowe v. Joliffe, 1 Black. Rep. 365.

(2) Vide suprà, p. 213.

(3) M'Kenire v. Fraser, 9 Ves. jun. 5. *

(4) Vid. sup. p. 362.

* In Calthorpe v. Gough and others, (4 T. R. 707. n. (a), 709. n. (†), a will thirty years old was not proved by witnesses, and it was said at the bar, that proof was not necessary on account of the age of the will; and in support of this a case of Mackery v. Newbolt was cited, in which Sir Lloyd Kenyon, then Master of the Rolls, decided, that a will above thirty years old should be read without proof, although the testator had died very recently. That point, however, was not decided in the case of Calthorpe v. Gough, because the plaintiff, the heir at law, admitted the will, and claimed under it.

CHAP. IX.

Of stamping, as a Requisite of Written Instruments.

A Written instrument, which requires a stamp, cannot be admitted in evidence, unless it be duly stamped; and no parol evidence will be received of its contents. If, therefore, the instrument produced is the only legal proof of the transaction, and that cannot be admitted for want of a proper stamp, the transaction cannot be proved at all (1); as, in an action for use and occupation, if it appears that the defendant held under a written agreement, which for want of a stamp cannot be received, the plaintiff will not be allowed to go into general evidence; for the agreement is the best evidence of the nature of the occupation (2). But it may happen, in a variety of cases, that the transaction is capable of being proved by other evidence besides the written instrument; and the objection arising from the stamp acts may be avoided by resorting to that other species of proof. Thus, although a receipt, for the payment of a bill, on unstamped paper is not admissible in evidence, yet the fact of payment may be proved by a witness, who saw the money paid; and even such an unstamped receipt may be shewn to the witness as a memorandum to refresh his memory (3). So in an action on a promissory note, though the plaintiff cannot give the note in evidence, unless it is duly stamped, yet he will not be precluded from recovering on one of the general counts of the declaration, if he can prove an admission of the original debt, or give other evidence of a consideration received by the defendant (4). And so, when a party to the

(1) R. v. St. Paul's, Bedford, 6 T. R. 452. Hodges v. Drakeford, 1 New Rep. 271.

(2) Brewer v. Palmer, 3 Esp. N. P. C. 213. Doe dem. St. John v. Hore, 2 Esp. N. P. C. 724.

(3) Rambert v. Cohen, 4 Esp. N. P. C. 213. Jacob v. Lindsay, 1 East, 460.

(4) Farr v. Price, 1 East, 57. Alves v. Hodgson, 7 T. R. 243. Tyte v. Jones, 1 East, 58. n. (a). Brown v. Watts, 1 Taunt. 353. Wade v. Beasley, 4 Esp. N. P. C. 7.

the suit admits on the record that, which, if not admitted, the other party must regularly prove, it cannot be necessary to produce that evidence, which would otherwise be required. As, where an action is brought upon an agreement, which ought to be stamped, and the form of the pleading is such as to make it unnecessary at the trial to produce the instrument, (as, if it is admitted on the record, and the trial is upon issues collateral to the existence of the agreement,) a court of law will not examine, whether the instrument is legally available with reference to the stamp acts (1). So, where a plaintiff filed a bill in Chancery for the specific performance of an agreement contained in a correspondence between him and the defendant, and the answer of the defendant admitted the letters, insisting only, that they did not amount to an agreement, the Court held that such an admission dispensed with the necessity of producing the letters, and that no objection could be taken to the agreement for the want of a stamp. (2)

Written agreements and other instruments, made in a foreign country, are not admissible in evidence in any of our courts, unless duly stamped by the laws of that country; if they are not obligatory abroad, they cannot be enforced here. As, where a promissory note had been made in Jamaica, but not stamped as it ought to have been by the laws of the island, the court of King's Bench held that a party could not recover here upon the note (3). The party, who takes this objection to the validity of the instrument, will have to shew, that a stamp was necessary by the law of the country; and for this purpose an authenticated copy of the law ought to be produced. If a person resident abroad desire his correspondent in England to fill up a bill of exchange, and return it to him to be signed, and he afterwards signs it abroad, the bill does not

(1) Per Ld. Eldon Ch., 11 Ves. 596.
(2) Huddleston v. Briscoe, 11 Ves. jun. 583.
(3) Alves v. Hodgson, 7 T. R. 241. Clegg v. Levy, 3 Campb. 166. S. P.

require to be stamped, as if it had been drawn in this country; and the rule is precisely the same, whether he signs his name as drawer, before or after he sends it over to this country to be filled up by his correspondent (1). In the case of Snaith v. Mingay (2), which was an action by an indorsee against the indorser, a person resident in Ireland subscribed his name in the character of drawer, and afterwards as first indorser, on a paper which was properly stamped according to the revenue laws of Ireland, and had every mark to designate it as a bill of exchange; he then sent it over to this country with authority to his correspondent to insert the day of the date, the sum, and the name of the drawee; and it did not appear, that there was any intention of evading the stamp laws, or any imputation of fraud in the transaction: under these circumstances the court of King's Bench were of opinion, that the bill was an incipient bill in Ireland, though it was completed here, and that, after it had been completed, it was to be considered as a bill of exchange from the time of its being signed by the drawer; and consequently that an English stamp was not necessary.

It is not sufficient that the stamp used is of the proper value; the stamp must also be of the proper denomination, that is, the peculiar stamp appropriated to the species of instrument (3). A receipt-stamp will not avail, if used upon a promissory note; nor a note-stamp, if used upon a receipt. So, articles of agreement under seal require a deed stamp; an agreement-stamp will not be sufficient, though it may be of greater value (4). An agreement for a house, and also for goods in the house, requires a lease-stamp; and, unless it is so stamped, cannot be given in evidence as an agreement for the sale of the goods, in an action to recover the amount (5). The statute 37 G. 3. c. 136.

(1) 1 Maule & Selw. 94.
(2) Ibid. 87.
(3) Stat. 37 G. 3. c. 136. s. 1. Stat. 48 G. 3. c. 149. s. 4. Chamberlain v. Porter, 1 New Rep. 30.
(4) Robinson v. Drybrough, 6 T. R. 317.
(5) Corder v. Drakeford, 3 Taunt. 382.

c. 136. contemplates the mistakes, which may arise in the use of stamps, and makes provision for those mistakes. It enacts, that where any instrument, (except bills, notes, and drafts,) shall have been stamped with a stamp of a different denomination, but of equal or greater value than that required by law, the commissioners, upon payment of the duty and a penalty of 5l., may stamp the same with a proper stamp. With respect to bills and notes, (which by statute 31 G. 3. c. 25. were forbidden to be stamped after they were made,) the statute of the 37th G. 3. provides, that bills and notes, which should be made subsequent to that act, and stamped with an improper stamp, but of equal or greater value than the stamp required, may be stamped by the commissioners on payment of the duty and a penalty. But bills and notes before that act remain in the same situation as if the act had not passed. The statute 43 G. 3. c. 127. s. 6. provides, that, if the stamp is of the proper denomination, it shall not be ineffectual from being of a greater value than the stamp acts require. Before this act, a stamp of greater value, though of the proper denomination, was determined to be insufficient (1). In the case of Taylor v. Hague (2), indeed, before the statute of the 43d G. 3. the Court held, that a promissory note upon a stamp of a higher value than was required, would be available, on the particular ground, that the value was composed of three different sums applicable to several funds, to which the duties on promissory notes are carried.

Where several stamps are necessary.

A question has often arisen, whether an instrument, to which several persons are parties, require several stamps, or whether a single stamp is sufficient. And the distinction established, is, that if the interest of the parties relates to one thing, which is the subject-matter of the instrument, or, in other words, if the instrument affects the separate interests of several, and there is a community of the same subject-matter as to all the parties (3), there a single stamp

(1) Farr v. Price, 1 East, 55.
(2) 2 East, 414.
(3) 13 East, 246.

 will

will be sufficient; but where the parties have separate interests in several subject-matters, there ought to be a separate stamp for each party, against whom, or in whose favour, the instrument is offered in evidence.

To illustrate the first part of the rule, if a debtor compounds with his creditors, and each creditor sign the same deed, covenanting either to give further day of payment, or to take a certain sum as a composition; there, every covenant is in fact a separate covenant, and the several deed of each creditor, who signs the deed; but the whole being only one transaction, a separate stamp for each person is not required (1). So, if several persons bind themselves severally in a penalty by one bond, conditioned for the performance of certain acts by each and every of them, such a bond requires only one stamp (2). Upon the same principle, it has been held, that an agreement relating to the prize shares of different persons, though several as to the share of each, yet being payable in respect only of one entire fund, is only chargeable with one stamp (3); and on the authority of this case, the court of King's Bench determined in a very late case, that a single stamp was sufficient for an agreement, which several persons had entered into for a subscription to one common fund, for the purpose of constructing a dock (4). In the case of Jones v. Sandys (5), the question was, whether a bond, in the condition of which a mortgage-deed was mentioned, ought to have had two stamps; and the court held that it was not necessary; and in delivering their opinion, they mentioned the cases of bargain and sale, lease and release, mortgage with covenant to pay the money, as constantly charged with only the single duty.

But the rule is different, where the instrument includes in effect several transactions, and the subject-matter is distinct as to the several parties. Thus, an instrument,

(1) 1 New Rep. 278.
(2) Bowen v. Ashley, 1 New Rep. 274.
(3) Baker v. Jardine, 13 East, 235. n. (b).
(4) Davis v. Williams, 13 East, 232.
(5) Barnes, 463.

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containing the admissions of several persons to a corporation, requires as many stamps as there are admissions. This was determined in the case of The King v. Reeks (1), where, in a trial at bar on an information in the nature of a quo warranto, to prove the admission of the defendant, a paper was produced, containing the admissions of the defendant and four other burgesses, which paper was stamped only with one stamp; it was then objected, on the part of the court, that this paper having only a single stamp could not be admitted to be read in evidence; for the statute 9 & 10 W. 3. c. 25. s. 27. enacts, that a certain duty shall be paid for every piece of parchment or paper upon which any admission into any corporation, &c. shall be written, and the 59th section enacts, that "if any instrument or writing by that act intended to be stamped, shall, contrary to the intent thereof, be written or engrossed by any person whatsoever (not being a known officer, who in respect of any public office or employment shall be entitled to write the same,) upon parchment or paper not stamped according to that act, then there shall be paid over and above the duty for such instrument ten pounds; and that no such instrument shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or equity, until as well the said duty as ten pounds should be paid, &c. and a receipt produced for the same, &c.;" under this section of the act it was insisted, that the instrument in question, being an admission of five persons to be burgesses, ought to have five stamps; that it could be good for none for the uncertainty, or at most it could be good only for one; if it was good for any, it must be for the first named; but the defendant was the third name, and therefore it could not be good for him. And of this opinion, as the report adds, was the whole court, after argument. The counsel for the defendant then offered in evidence four other distinct pieces of parchment, bearing date on the day mentioned in the information, each of them being duly stamped, which imported the several admissions

(1) 2 Ld. Raym. 1445. 2 Str. 716. S. C.

and swearings of the four burgesses last named in the other parchment, and one of them the particular swearing and admission of the defendant. But the witness who produced these pieces of parchment proved that the entries were not made upon them, nor were any of them stamped, till near two months after the day on which they bore date; and, an objection being taken on this ground to the single instrument, which stated that the defendant alone was admitted and sworn, the Court was clearly of opinion, that it could not be admitted in evidence; for by the act the admission is to be on paper or parchment, stamped at the time; otherwise it is not to be given in evidence, till the penalty is paid, and certificate thereof produced.

In the case of The King v. Reeks, which has been just mentioned, the instrument first offered in evidence purported to contain the admissions of five burgesses, and it does not appear, that the single stamp, which was impressed, applied more to the defendant's name than to any of the others. This circumstance distinguishes that case from two others lately decided, Powell v. Edmunds (1), and Doe on the demise of Sir Joseph Copley v. Day (2), in which a paper containing contracts by several persons relative to different things, though stamped with a single stamp, was adjudged to be good evidence as to one of the contracting parties, because the stamp appeared to be applicable exclusively to his name. In the first case, the paper contained an agreement signed by the defendant for a lot of timber, and underneath a second agreement with another person for a different lot; this last had pencil marks drawn across it, as if for the purpose of striking it out; the stamp was affixed on that part of the paper on which the defendant's agreement was written, and below was the stamp officer's receipt for a penalty "for making the above agreement." An objection was taken on the

(1) 12 East, 6.

(2) 13 East, 241. See also Waddington v. Francis, 5 Esp. N. P. C. 182.

ground

ground of there being a single stamp, which was overruled at the trial, and afterwards by the court of King's Bench. In the other case (1), the paper contained a variety of independent lettings of land between the landlord and a number of his tenants, one of whom was the defendant; the stamp was affixed opposite the defendant's name, and it appeared from the receipt of the stamp-officer, that the money was paid for affixing it after the commencement of the action, and only a short time before the trial; the instrument also appeared, when produced in evidence, to be cancelled with black lead pencil marks as to every name except that of the defendant, and it was not proved that the instrument was not so cancelled at the time when the stamp was affixed. Under these circumstances, the Court held that the single stamp was intended to be applied to the contract with the defendant, and consequently that the paper was admissible. "If, indeed," said Lord Ellenborough C. J. "the instrument had been required to substantiate the several contracts with the different tenants, no doubt there should have been a stamp affixed to each, although the same terms of agreement applied to all; one stamp has been only held to be sufficient upon an instrument affecting the separate interests of several, where there has been a community of the same subject-matter as to all the parties. But here it sufficiently appears from the circumstances of the case, that the stamp was meant to be applied to the defendant's signature."

When a stamped instrument has been once used for one purpose, it cannot be altered without a new stamp. If the parties have altered their original intention, and make a new instrument different from that which they originally contemplated, a new stamp will be necessary (2). If a bill of exchange, for example, has been once effected, and has issued in a perfect form from the drawer to the acceptor, by whom it was returned with his acceptance to the drawer, Alteration of stamped instrument.

(1) 13 East, 241. See also, Waddington v. Francis, 5 Esp. N. P. C. 182.

(2) 15 East, 418.

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it cannot be altered without being re-stamped. Thus, in the case of Bowman v. Nichol (1), where a bill of exchange had been drawn on a proper stamp, payable 21 days after date, and, while it continued in the hands of the drawer, was altered with the consent of the acceptor to be made payable 51 days after date, and was again altered to 21 days after date, subsequently to the time of its becoming payable according to its original form; the court of King's Bench held, that, at the time when the last alteration was made, the operation of the bill, as it originally stood, was quite spent; that it was a new and distinct transaction between the parties; and that there ought to have been a new stamp. So where a promissory note, payable by the defendant to the plaintiff or order (2), was originally expressed to be for value received, but, on the day after it had been signed and delivered by the defendant to the plaintiff, was with the consent of the parties altered by the addition of the words "for the good will of a lease and trade," the Court held, that the alteration was a material one, because it was evidence of a fact, which, if necessary to be inquired into, must otherwise have been proved by different evidence, and also because it pointed out the particular consideration for the note, and put the holder upon inquiring, whether that consideration had passed; a new stamp was therefore necessary, for the want of which the note could not be received in evidence. The same rule is equally applicable to the case of an accommodation bill. (3)

By the 13th section of the stat. 35 G. 3. c. 63., (relating to stamp-duties on sea-insurances,) it is provided, "that nothing in that act shall be construed to extend to prohibit the making of any alteration, which may lawfully be made in the terms or conditions of any policy of insurance duly stamped, after the same shall have been underwritten,

(1) 5 T.R. 537. See also Master v. Miller, 4 T. R. 320. Cardwell v. Martin, 1 Campb. 79; 9 East, 190, S.C. Bathe v. Taylor, 15 East, 412. Calvert v. Roberts, 3 Campb. 343; the case of an accommodation-bill.

(2) Knill v. Williams, 10 East, 431.

(3) Calvert v. Roberts, 3 Campb. 343.

or

or to require any additional stamp-duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration, originally paid or contracted for, shall exceed the rate of 10 shilling per cent. on the sum insured, and so that the thing insured shall remain the property of the same persons, and so that such alteration shall not prolong the term insured beyond the period allowed by this act, and so that no additional or further sum shall be insured by means of such alteration." On the construction of this clause, in the case of Kensington v. Inglis (1), where the policy was "on goods and specie on board of ship or ships sailing between the 1st of October 1799, and the 1st of June 1800, being the property which should first sail to a certain amount, and upon the vessels carrying the goods," and a memorandum was written on the policy, and subscribed by the defendant, on the 11th of June 1800, before any notice of the determination of the risk had been received, by which memorandum it was agreed to extend the time of sailing to the first of August following, in this case the court of King's Bench held, that the memorandum did not require a stamp; for although the time of sailing was extended, yet no new subject of insurance is introduced by the memorandum, but the object insured continues the same. In another case (2), which occurred upon the same clause, where the policy was originally "on ship and *outfit*," from London to the South Seas, but after the sailing of the ship was altered by consent of the underwriters, and declared to be "on the ship and *goods*," instead of ship and *outfit*, the Court determined that as the *outfit*, originally insured, was essentially different from *goods*, which were afterwards made the subject of insurance, the policy in its altered state required an additional stamp. The question is, said Lord Ellenborough C. J., in delivering the judgment of the Court, whether that part of the pro-

(1) 8 East, 273.

(2) Hill v. Patten, 8 East, 373.

vision,

vision, which requires that "the thing insured shall remain the property of the same person" has been in this case complied with. The words, "the thing insured shall *remain* the property," appear properly to require and apply to *one* identical and continued subject-matter of insurance; such subject-matter *all along remaining* the property of the same proprietor, and to be ill-suited to a case like the present, where the thing last insured is, not only in fact, but in name and kind, (as a specific subject of insurance) essentially different from the thing first insured, and which begins also to have an existence at a different and much later period than the other, and when the thing first insured scarcely, or in a small degree only, *remains* or continues to exist at all."

But where an alteration is made in an instrument with the consent of all parties, in order to correct a mistake, and to make the instrument consistent with the original intention of the parties, there it has been held, that a fresh stamp is not necessary. Thus, in the case of Kershaw v. Cox (1), where a bill had been drawn, payable to the defendant but not payable to order, the defendant, on the day after the bill was drawn, indorsed it over to the plaintiff, without adverting to the omission of the words "or order;" on the same day the plaintiff returned it to the defendant to get the omission rectified, and the drawer then inserted the words; here there was strong evidence to shew, that the omission was by mistake, for the bill was intended to be negotiable, and, as such, immediately indorsed, as if it had been drawn payable to order, and, as soon as the omission was discovered, it was rectified by the proper parties; the learned Judge, therefore, who tried the cause, left it to the jury to consider, whether the words afterwards added had been originally intended to have been inserted, but were omitted by mistake; and, the jury finding this to be the case, it was ruled, that a fresh stamp was not required. The point was

(1) 3 Esp. N. P. C. 246. cor. Le Blanc J., cited 10 East, 435, and 15 East, 417.

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afterwards brought before the Court of King's Bench, on a motion to enter a nonsuit, and the alteration was adjudged to be allowable under the stamp acts; having been made merely for the purpose of rectifying a mistake in drawing the bill contrary to the intention of the parties. In another case, which occurs upon this subject, where an action was brought against the defendant as acceptor of a bill of exchange (1), it appeared that the defendant and another person being indebted to the plaintiff, agreed to give him a bill of exchange, to be drawn by the one and accepted by the other (the defendant); instead of this they sent him a promissory note made by the one and indorsed by the other, which the plaintiff immediately returned, that it might be altered into a bill of exchange according to the agreement, and the alteration was accordingly made; an objection was taken, on the ground, that the instrument required a fresh stamp; but Lord Ellenborough C. J. ruled, that the stamp impressed was sufficient to render the instrument available, since it had not been negotiated as a promissory note, and the alteration might be treated as the correction of a mistake, according to the terms of the original agreement.

So, when a bill of sale of a ship, in reciting the certificate of registry, stated Guernsey as the port, where the certificate was granted, instead of Weymouth, and in this state was executed, but the mistake being afterwards discovered was rectified with the consent of all parties, and the deed delivered de novo (2); the question was, whether this second delivery made a new stamp necessary; Lord Ellenborough C. J., in delivering the judgment of the Court, referred to statute 26 G. 3. c. 60. s. 17., which enacts, that a bill of sale of a registered ship, which does not truly and accurately recite the certificate of registry in words at length, shall be utterly null and void to all intents and purposes.

(1) Webber v. Maddocks, 3 Campb. 1.

(2) Cole and others, Assignees of Doyle, v. Parkin, 12 East, 471.

purposes. "This bill of sale therefore, when first executed, was, from the mistake in the recital of the certificate of registry, to all intents and purposes null and void; it took no effect whatever from its first delivery; and the stamp impressed upon it was wholly inoperative. This defect arose not from intention, but from mistake. The instrument, as first executed, was not what the parties meant to execute; and it was not in the state, in which it was at first intended to be, till it was altered. This is not the case of substituting a new and second contract, in the place of a preceding effectual one, upon a change of intention in the parties; but merely making the contract what it was originally intended to have been; and in such a case, where the instrument upon its first execution was void to all intents and purposes, where its insufficiency arose from a mere mistake, where in consequence of that mistake it was not in the state in which it was intended to have been when it was so executed, and where upon its second execution it is only put into that state which was originally intended, we think it is not going beyond the fair spirit of the stamp-laws to hold, that upon such second execution, being the first which was effectually operative, a new stamp was not requisite." So, the mistake of an agent, in declaring the interest in the margin of a policy to be on a ship by a wrong name, may be rectified by inserting the true name, without a fresh stamp. (1)

Where an unstamped instrument may be evidence for collateral purposes.

Written instruments have been admitted in evidence without a stamp, in certain cases, where they were produced merely to prove something collateral, and not for the purpose of being enforced between the parties, and where it was not material to consider, whether the instruments were good or available in law. In the case of Holland q. t. v. Duffin (2), which was an action to recover several sums of money forfeited by insuring tickets in the

(1) Robinson v. Touray, 1 Maule & Selw. 217. Sawtell v. Loudon, 5 Taunt. 359.

(2) Peake's N. P. C. 57.

lottery,

lottery, contrary to the statute 22 G. 3. c. 47. s. 13., Lord Kenyon held, that an instrument, purporting to be a policy of insurance, might be given in evidence, though not stamped as a policy; for such a contract is declared by the act to be illegal and void, and could not have been intended by the legislature as an object of taxation. And in an action of debt for bribery at an election (1), under the stat. 2 G. 2. c. 24. s. 7., Lord Ellenborough C. J. held, that an unstamped promissory note, payable to the defendant, which a witness said he had given for the re-payment of money received by him as a voter from the defendant (one of the candidates), might be admitted as evidence of the transaction, to corroborate the testimony of the witness. So, an unstamped receipt may be shewn to the witness, as a memorandum, in order to refresh his recollection of a fact there stated (2). So, the unstamped part of an agreement is admissible, on the part of the plaintiff, as secondary evidence of the agreement, after proof of notice to the defendant to produce the stamped part, which is in his possession (3); and there can be no difference in this respect, whether the plaintiff has specially declared upon the agreement, or merely offers it as evidence in the course of the cause. So, in the case of a parish-settlement, although a general hiring cannot be presumed from the mere fact of service, where the service has been performed under written articles of agreement, which are not admissible in evidence for the want of a proper stamp, yet, where the question is, whether the service commenced after the expiration of the articles, they may be inspected for the purpose of ascertaining, whether they would apply to the subsequent service (4). And, upon the same principle, it should seem, in an action for the non-delivery of goods, if the contract is proved by parol evidence, and it should appear that the parties made a contract on unstamped paper, the Court may inspect the

(1) Dover v. Maestaer, 5 Esp. N. P. C. 92.

(2) Rambert v. Cohen, 4 Esp. N. P. C. 213. Jacob v. Lindsay, 1 East, 460. See ante, p. 209. 386.

(3) Garnons v. Swift, 1 Taunt. 507. Waller v. Horsfall, 1 Campb. 501.

(4) R. v. Pendleton, 15 East, 449. 455.

instru-

instrument, to see whether it applies to the goods, which are the subject of the action; and, if they are not included in the contract, the parol evidence would be properly admitted (1). So, a written agreement may be recovered in an action of trover, though unstamped (2); and, in such an action, it will not be necessary to give notice to the other party to produce the agreement (3). So, in an action for money lent, where the plaintiff proved, that he had advanced the money to the defendant, who gave him a note for the amount on unstamped paper, and the defence was, that he had been induced to give the note in a state of intoxication, without having received any part of the money, Lord Ellenborough C. J. held, that the note might be inspected by the jury, as a cotemporary writing, to prove or disprove the fraud imputed to the plaintiff. (4)

A paper, purporting to be a bill of exchange or promissory note, may be given in evidence, though unstamped, to support an indictment for forgery, or for uttering with a knowledge of the forgery (5); for, "the stamp acts being revenue laws, and not intended to affect the crime of forgery, cannot alter the law respecting it; the stamp is not, properly speaking, any part of the instrument, but merely a mark impressed on the paper, to denote the payment of a duty, and is collateral to the instrument itself: and as to the statute enacting (6), "that no promissory note, bill of exchange, &c., not stamped, as therein directed, shall be pleaded or given in evidence in any court, or admitted in any court to be good, or available in law or equity," the legislature thereby meant only to prevent their being given in evidence, when they were proceeded upon, to recover the value of the money thereby secured. It is cer-

(1) 15 East, 455.
(2) Scott v. Jones, 4 Taunt. 865.
(3) Ib., and see ante, p. 339.
(4) Gregory v. Fraser, 3 Campb. 454.
(5) Hawkeswood's case, 1783., 1 Leach. Cr. C. 292, 2 East, P. C. 955. S. C. Lee's case, 1784., 1 Leach Cr. C. 293. n. (a). Morton's case, 1795., 2 East, P. C. 955. Reculists' case, 1796, 2 Leach, Cr. C. 811. Davies's case, 1796, 2 East, P. C. 956. See Whitwell v. Dimsdale, Peake, N. P. C. 168.
(6) St. 31 G. 3. c. 25. s. 19.

tain that no holder of such an instrument as the present could, if it had been genuine, have founded an action upon it, and given it in evidence as a *promissory note;* but it is equally certain, that it might have been given in evidence on other occasions, as, for instance, if a person negotiating it were to be sued for the penalty inflicted upon the offence of negotiating such an instrument unstamped, there is no doubt, but that it might be given in evidence; and this instance shews most clearly, that it was properly received in evidence on the trial of this indictment, notwithstanding the seeming prohibitory words in the statutes." (1)

In the case of The King v. Pooley (2), the prisoner was indicted under the statute 7 G. 3. c. 50. s. 1., which makes it a capital felony for any person, employed in receiving letters, to secrete any letter containing a bank-note, or any warrant or draft, &c. for the payment of money. It appeared at the trial, that the draft contained in the letter, which the prisoner had secreted, was drawn above ten miles from the banking-house; the prisoner's counsel then objected, that, as the draft was on unstamped paper, it was not a valid order for the payment of money, and therefore not within the statute, on which the prisoner was indicted; and they founded this objection on the statute 31 G. 3. c. 25., the fourth section of which exempts from stamps only such orders for the payment of money as are drawn on a banker residing within ten miles of the place where the order is made, and the nineteenth section provides, that no bill, note, draft, &c. shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, unless they are written on paper duly stamped. This point was reserved at the trial, and the case was afterwards argued before the Judges in the Exchequer-Chamber; when the

(1) By Grose J. in delivering the opinion of the judges in Reculists' case, 2 Leach, Cr. C. 813.

(2) 3 Bos. & Pull. 311.

objection taken on the part of the prisoner was, first, that which has been stated, namely, that the draft in question was not a draft for the payment of money, within the meaning of the stat. 7 G. 3. c. 50. s. 1.; and, secondly, that the indictment, which averred, that the draft was in force at the time of the secreting, had not been proved, as from the want of a stamp the draft had never been available. The opinion of the Judges was not publicly declared: but the prisoner received a pardon for the offence charged in the indictment; and he was afterwards tried (1) on the second section of the same act, which makes it a capital offence for any person to rob any mail of a letter or packet, or to steal or take any letter from any mail, or from any place for the receipt of letters, &c. It was objected at the second trial, that the draft, before mentioned, being on unstamped paper could not be received in evidence as a medium to shew that the prisoner had stolen the letter: but the Court over-ruled the objection, being of opinion, "that the draft, though unstamped, might be admitted in evidence for collateral purposes, though not for the purpose of recovering the money mentioned in it, and the evidence was accordingly received." Here the paper was not offered in evidence as it was on the former trial, as a draft for the payment of money, but merely as a paper contained in the letter, and the fact of the prisoner having this paper in his possession, was evidence against him of his having stolen the letter, in which it was contained.

An objection, similar to that which was taken on the former trial in the last case, was again made in the case of The King v. Gillson (2). The indictment was for feloniously setting fire to a certain house with intent to defraud an insurance company; at the trial, a policy of insurance was given in evidence on the part of the prosecution, by

(1) 3 Bos. & Pull. 315. And this part of the case is reported in 1 East, Pl. Cr., addenda, xvii.

(2) 1 Taunt. 25.

which the prisoner's goods, in a house there described, were insured against fire, and upon this policy a memorandum was indorsed, stating that the goods insured had been removed from the house described in the policy to another house mentioned in the memorandum, in which last-mentioned house the prisoner was charged with having committed the felony; the policy was properly stamped, but the memorandum had no stamp; and the objection taken for the prisoner was, that in support of the charge it was essentially necessary to shew, that there subsisted a legally effective contract, and that, by the express provision of the stamp-acts, the memorandum in question not being stamped could not be given in evidence, or be good or available in any manner whatever; and a distinction was drawn between this case and the above-mentioned, where an unstamped forged instrument was admitted in evidence against the party charged with having forged it, or with uttering it knowing it to be forged. The point was reserved for the opinion of the Judges, and argued in the Exchequer-Chamber; and judgment was afterwards given at the Old Bailey, that the prisoner should be discharged.

If an instrument, which ought to be stamped, is proved to have been lost, parol evidence of it's contents may be admitted, without proof of the stamp being regular; it may be presumed under the circumstances of the case, that the instrument was duly stamped, where the contrary is not shewn (1). In the latest case upon this point, on a question of settlement between two parishes (2), it appeared that an indenture of apprenticeship, which had been regularly executed thirty years before, was delivered to the apprentice at the end of the term, and lost; that a premium was paid with the apprentice; and further, that the parish in which he had served under the indenture, had for many years treated him as one of their parishioners; on the other

(1) R. v. East Knoyle, Burr. Set. Case, 151. 1 Bott. 547. S. C. R. v. Badby, 1 Bott. 549, S. P.

(2) R. v. Long Buckby, 7 East, 45.

side it was proved by the deputy register and comptroller of the apprentice duties, that it did not appear that such an indenture had been stamped with the premium stamp, or enrolled, from the time of the date to the time of the trial of the appeal; but the Court of King's Bench were of opinion, that the Court below were right in presuming, that the indenture had been properly stamped. "The question before the Justices," said Lord Ellenborough, "was, whether the presumption, that all was rightly done after the lapse of so many years, was sufficiently rebutted by the negative evidence of the officer; they thought not, and we cannot say, that they have done wrong; for the presumption of law is to be favoured, and against the negative evidence they may have set the possibility of an irregularity in the returns made to the office."

If an action cannot be brought upon an agreement, until it is stamped, it must be stamped before the commencement of the action: but if it is an agreement, which may be stamped on the payment of a penalty, then it may be stamped during the action (1). In some cases the legislature has declared, that the paper cannot be stamped after it has been written, as in stat. 35 G. 3. c. 63. s. 14. concerning sea-insurances (2). In other cases it is declared, that a penalty shall be incurred by writing on unstamped paper; and that the instrument is not available in evidence, until the duty and penalty are first paid, and a receipt for them produced, and until the instrument is marked with a proper stamp (3). Here the defect may be cured by having a proper stamp affixed, which may be done by paying the duty, together with the penalty, for not having the instrument stamped within the time limited (4). In other cases the legislature only impose a penalty for not having the instrument duly stamped; and in these, though

(1) 9 Ves. jun. 252. 11 Ves. jun. 595.
(2) Roderick v. Hovil, 3 Campb. 103.
(3) St. 5 & 6 W. & M. c. 21. s. 11. 12 Ann. st. 2. c. 9. s. 25. St. 37 G. 3. c. 136. s. 2.
(4) R. v. Bishop of Chester, 1 Stra. 624.

the

the party would be liable to a penalty, yet the paper may be given in evidence, though unstamped (1). It has been before mentioned (2), that the defendant after paying money into court, in an action on a bill of exchange, cannot object to the sufficiency of the stamp. The payment of money admits the validity of the instrument.

By the stat. 48 G. 3. c. 149. (3), which regulates the present stamp duties, every agreement, minute or memorandum of agreement, (not particularly exempted,) that is made in England under-hand only, or made in Scotland without any clause of registration, is liable to a stamp in proportion to the number of words contained, *when the subject-matter is of the value of* 20l. *or upwards*, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument. Agreements.

An agreement is to be stamped in proportion to the number of words, which it contains, not according to the number of items agreed upon. But if the parties add another item to an agreement, which is already complete and has been executed between them, an additional stamp ought to be annexed, to make such new item available. As, if two persons lay a wager, and write it down in the form of an agreement, which is stamped, and afterwards by another agreement, indorsed on the first, they consent that the bet shall be doubled; here there ought to be two agreement-stamps, or the party cannot recover on the last bet (4). A written acknowledgment of the payment of money, stamped as a receipt, is evidence of the fact of payment, although there may be other writing on the same paper amounting to an agreement, provided this does not in any manner controul or qualify the former part. (5)

(1) R. v. Pearce, Peake N. P. C. 75.

(2) Israel v. Benjamin, 3 Campb. 40. Ante, p. 143.

(3) See also St. 23 G. 3. c 58. s 3. St. 35 G. 3. c. 30. s. 1. 6. St. 37 G. 3. c. 90. s. 1. 6.

(4) Robson v. Hall, Peake, N. P. C. 127. Lord Kenyon was of opinion, that the plaintiff might recover on the *original* bet. But the plaintiff was nonsuited on another point.

(5) Grey v. Smith, 1 Campb. 387.

A cognovit being a mere acknowledgment of an account without any mutuality, does not require a stamp. But if there be any thing of agreement beyond the mere authority to enter a cognovit, then a stamp becomes necessary. Thus, where the defendant gave a cognovit to the plaintiff on unstamped paper, by which he agreed to confess that the plaintiff had sustained a damage in the action to the amount of 30l., on which no judgment was to be entered, unless the defendant made default in payment of the sum of 5l. by instalments, together with costs to be taxed, the Court held, that, in consequence of the terms which had been added, the paper in question amounted to an agreement; but that it was an agreement for less than 20l., and therefore not liable to a stamp. (1)

The following particulars are exempted from stamp-duties imposed on agreements. (2)

1. Any label or memorandum containing the heads of insurances to be made by the Royal Exchange Assurance and London Assurance.

2. Memorandum or agreement for granting a lease or tack, at rack-rent, of any land or tenement, under the yearly rent of 5l.

Whether a particular agreement is to be considered as a lease, (in which case it will require a lease-stamp,) or merely as an agreement for a lease, must depend entirely on the intention of the parties, as it is to be collected from the whole of the instrument. If the words are that the one party *does* thereby demise, &c., or that the other party *shall* have, &c., and no other words appear to qualify the expression, they are to be construed as a lease (3). And

(1) Ames v. Hill, 2 Bos. & Pull. 150. Reardon v. Swaby, 4 East, 188. S. P.

(2) St. 48 G. 3. c. 149. See also St. 23 G. 3. c. 58. s. 3. St. 35 G. 3. c. 30. s. 1. 6. St. 37 G. 3. c. 90. s. 1. 6.

(3) Drake v. Munday, Cro. Car. 207. Maldon's case, Cro. El. 33. 5 T. R. 167.

where

where the instrument appears to have been intended to transfer a present interest, or where it contains words of present demise without any thing to shew that the parties had in contemplation a mere executory contract, the instrument will be considered as an actual lease, notwithstanding there may be a stipulation for executing a subsequent lease under seal (1). If indeed the words do not import immediate possession, (as where it is agreed that the party *shall* have and enjoy the land, &c.) such a stipulation would warrant the conclusion, that the instrument was intended, not as of itself a perfect lease, but as an agreement for a lease. (2)

3. Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant.

An agreement for the assignment of an apprentice from one master to another is not within the meaning of this clause; the term "hiring" not being applicable to an apprentice. (3)

4. Memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandize.

Upon this clause it has been determined, that an agreement by the defendant to take a share of some goods, which had been bought by the plaintiff on their joint account, and to pay for them at a certain time, is an agreement *relating to* the sale o[f g]oods, and therefore exempted from a stamped duty (4); so also is an agreement by a broker to indemnify his principal, for whom he bought goods, from any loss on a re-sale (5); or a guarantie for

(1) Harrington v. Wise, Cro. El. 486. Tisdale v. Sir W. Essex, Hob. 34. Baxter v. Brown, 2 Black. 973. Barry v. Nugent, cited, 5 T. R. 165, 7. Poole v. Bentley, 2 Campb. 286, 12 East, 168. S. C. Tempest v. Rawling, 13 East, 18.

(2) Doe dem. Jackson v. Ashburner, 5 T. R. 163. And see Coore v. Clare, 2 T. R. 739.

(3) R. v. St. Paul's, Bedford, 6 T. R. 453.

(4) Venning v. Leckie, 13 East, 7.

(5) Curry v. Edensor, 3 T. R. 524.

the payment of goods, which a third person was about to purchase to a certain amount (1); or a receipt for the price of a horse containing a warranty of soundness. (2)

An agreement for the making of goods is a mere executory contract for work to be done, not for the *sale* of goods; consequently it is not within the exemption (3). But a written memorandum, ordering goods to be made, but not proving the contract between the parties, may be admitted in evidence without a stamp, as it is not an agreement. (4)

An agreement for the sale of crops growing on certain lands, to be delivered afterwards, has been determined to be an agreement for an interest in land, and is therefore not exempted as a sale for *goods* (5). "The subject-matter of the agreement," said Mr. Justice Heath, in the case of Waddington v. Bristow (5), "must be taken with reference to the time at which the contract was made. Now at that time the crops did not exist in the state of goods." And Mr. Justice Chambre said, "Though I admit that a contract for the sale of so many hops as twenty-two acres might produce, to be delivered at a distant day, might fall within the exemption of the act, notwithstanding the hops were not in the state of goods at the time of the contract made, yet I cannot think the present agreement within the exemption, since it gives an interest to the vendee in the produce of the vendor's land." But where the owner of a close, cropped with potatoes, agreed to sell them at a certain rate, and the purchaser was to take them up immediately, the court of King's Bench held, that this agreement was not for any interest

(1) Warrington v. Furbor, 8 East, 242.

(2) Skrine v. Elmore, 2 Campb. 407.

(3) Towers v. Sir J. Osborne, 1 Stra. 506., 7 T. R. 17. Buxton v. Bedall, 3 East, 303.

(4) Ingram v. Lea, 2 Campb. 521.

(5) Waddington v. Bristow, 2 Bos. & Pull. 453. Crosby v. Wadsworth, 6 East, 602. Emmerson v. Heelis, 2 Taunt. 38.

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in the land (1); and the distinction, taken between this and the two cases just mentioned, was, that there the contracts were for the growing crops of hops and grass, (and therefore the purchasers of the crops had an immediate interest in the land, while the crops were growing to maturity,) but here the land was to be considered as a mere warehouse for the potatoes, till the purchasers could remove them, which was to be done immediately. So, where the agreement was to sell all the potatoes growing on a certain piece of land of the defendant, and the plaintiff to dig them up and carry them away, the Court held, that the contract was confined to the sale of the potatoes, as mere chattels, and that nothing else was in the contemplation of the parties. (2)

5. Memorandum or agreement made between the master and mariners of any ship or vessel, for wages, on any voyage coastwise from port to port in Great Britain.

6. Letters containing any agreement (not before exempted) in respect of any merchandize, or evidence of such an agreement, which shall pass by the post, between merchants and other persons carrying on trade or commerce in Great Britain, and residing and actually being at the time of sending such letters at the distance of 50 miles from each other. (3)

A letter written by one, who managed another person's trade, to a creditor, promising to pay a debt which arose in the regular course, has been held, to come within the letter and spirit of this exemption. (4)

(1) Parker v. Staniland, 11 East, 362.
(2) Warwick v. Bruce, 2 Maule & Sel. 205.
(3) Leigh v. Banner, 1 Esp. N. P. C. 403.
(4) M'Kenzie v. Banks, 5 T. R. 176.

CHAP. X.

Of the Admissibility of Parol Evidence to explain, vary, or discharge Written Instruments.

THE order, in which it is proposed to treat of this intricate and extensive subject, is, First to consider in what cases parol evidence is admissible to explain ambiguities in written instruments; Secondly, whether parol evidence is admissible to add to, vary, or discharge written instruments; and, Thirdly, to consider the rule of evidence on this subject, established in courts of equity.

SECT. I.

Of the Admissibility of Parol Evidence to explain Ambiguities.

THERE are two sorts of ambiguities of words, says Lord Bacon (1); the one is called *ambiguitas latens*, the other *ambiguitas patens*. The first occurs, where the deed or instrument is sufficiently certain and free from ambiguity, but the ambiguity is produced by evidence of something extrinsic, or some collateral matter out of the instrument; the latter kind is such as appears on the face of the instrument itself.

Latent ambiguity.

In the first case, the ambiguity, which is raised by extrinsic evidence, may be explained in the same manner. Thus, if a person grant his manor of S. to one and his heirs, so far there appears to be no ambiguity; but if it should be proved, that the grantor has the manors both of South S. and North S., this ambiguity is matter in fact, and parol evidence may be admitted to shew, which of the two manors the party intended to convey (2). So, it was

(1) Bac. Elem., rule 23.

(2) Bac. Elem., ib.

resolved

resolved in Lord Cheyney's case (1), if a person has two sons both baptized by the name of John, and conceiving, that the elder who had been long absent is dead, devises his land by his will in writing to his son generally, and in truth the elder is living, in this case the younger son may in pleading or in evidence allege the devise to him, and if it is denied he may produce witnesses to prove his father's intent, that he thought the other was dead; or, that at the time of making his will, he named his son John the younger, and the writer left out the addition. No inconvenience, adds Lord Coke, can arise, if an averment be taken in such a case; for he who sees the will, by which land is so devised, cannot be deceived by any secret averment; when he sees the devise to the testator's son John generally, he ought at his peril to inquire which John the testator intended, which may easily be known by him, who wrote the will, and by others who were privy to the intent; and, if no direct proof can be made of his intent, there the devise is void for its uncertainty.

When a devise in a will is to a person, designated by a christian and surname without any other description, and no such person appears to claim the legacy or to have been known by the testator, parol evidence may be admitted to shew, that both the names have been mistaken by the person who took the instructions for the will; as, in the case of Beaumont v. Fell (2), where a legacy was bequeathed to Catharine Earnley, and the name of the person who claimed the legacy was Gertrude Yardley, the Court established the claim, observing how very material it was, that no such person as Catharine Earnley claimed under the will. Here, there was no ambiguity on the face of the will, but the latent ambiguity was introduced by extrinsic

(1) 5 Rep. 68 b. See also Altham's case, 8 Rep. 155. Hob. 32. Jones v. Newman, 1 Blackst. 60. Harris v. Bp. of Lincoln, 2 P. Wms. 136.

(2) 2 P. Wms. 140. See also Dowset v. Sweet, Ambl. 175. Bradwin v. Harpur, Ambl. 374. Parsons v. Parsons, 1 Ves. jun. 266. 3 Ves. jun. 322. Smith v. Coney, 6 Ves. jun. 42. Doe dem. Cook v. Danvers, 7 East, 303.

evidence,

evidence, and the same kind of evidence also shewed, that there was a person of the name of Gertrude whom the testator called Gatty, which name the person who drew the will mistook for Katy; in this case, therefore, as parol evidence was admitted to shew the latent ambiguity, parol evidence was also admitted to explain it. So, where the testator bequeathed his stock in a particular fund, and it appeared, that he had not at the time of making his will or afterwards any stock in that fund, having sold out some time before and purchased into another fund, evidence was admitted to shew whence the mistake arose, and the legacy was satisfied out of the new fund, into which the testator had purchased (1). So, where the devise was "of *all* my farm and lands called Trogues-farm, now *in the occupation of A. C.*," the court of King's Bench were clearly of opinion, that two closes *in the occupation of L. M.*, but forming a part of Trogues-farm, would pass under the devise; and that a written notice from the testator to L. M. had been properly admitted in evidence, to shew that he considered them as parcel of his farm called Trogues-farm (2). Here the devise was sufficiently comprehensive to include the whole of the lands, and ought not to be narrowed by the defective description of the occupation.

In the instances, which have been just mentioned, it is to be observed, that, unless the evidence had been admitted, the will could not have taken effect. In the first case, no person was to be found corresponding with the description in the devise; in the second, the testator had no property in the funds, out of which he appointed the legacy to be paid; and in the third, if the closes in question were not to be included as part of the devised farm, the word "all" in the devise would not be satisfied. And the question on the admissibility of parol evidence, in such cases, will depend principally upon this, namely, whether the evidence

(1) Selwood v. Mildmay, 3 Ves. jun. 306.

(2) Goodtitle dem. Radford v. Southern, 1 Maule & Selw. 299.

is

is necessary to give an effective operation to the devise, or whether, without that evidence, there appears to be sufficient to satisfy the terms of the devise and the intention of the testator as expressed on the face of the will. If the testator has left property which corresponds with the description in the will, extrinsic evidence is not admissible to shew, that he intended to include other property not within that description (1). In the case of Whitbread v. May (2), where the testator, having devised all his estates in trust for his son for life with remainder over in strict settlement, &c., by a codicil afterwards revoked his will "so far as it related to *his estate at* Lushill, in the county of Wilts, and *Hearne* and Buckland, in the county of Kent, which he devised to his son in fee," it appeared, that at the time of the devise the testator had lands in the parish of *Hearne* and in several other parishes, all which he had purchased by one contract from one person; evidence was then offered to shew that the testator, by the description of his "*estate at Hearne*," meant to designate and include not only the lands in that parish, but also all the other lands which he had purchased at the same time. This evidence was received at the trial, subject to the opinion of the Court above; and the Court of Common Pleas were afterwards equally divided in opinion on the question of its admissibility. In a much later case (3), however, which was very similar to the last, the Court of Common Pleas adjudged such evidence to be inadmissible. The question there was, whether on a devise of the testator's "*estate of Ashton*," parol evidence could be admitted to shew, that the testator intended by that description to devise all his maternal estate, which consisted of two manors in the parish of Ashton and another manor

(1) Doe dem. Brown v. Brown, 11 East, 441. 3 Taunt. 147.

(2) 2 Bos. & Pull. 593.

(3) Doe dem. Sir A. Chichester v. Oxenden, 3 Taunt. 147. A motion for a new trial was made in Mich. term 1814, in the case of Doe on the demise of Brown v. Green, (which was tried by Mr. Justice Dallas at Gloucester,) on the ground of the rejection of evidence. The devise was of the testator's "*estate at Cosholm*," and evidence was offered, to shew, that the testator intended to devise other premises besides those *at Cosholm*, which was refused. And the Court of King's Bench were of opinion, that the evidence had been properly rejected, and refused to grant a rule.

in the adjoining parish; the Court of Common Pleas, after hearing two arguments, determined against its admissibility. The Chief Justice, Sir James Mansfield, in delivering the judgment of the Court, after premising that he had felt considerable doubts on the subject in consequence of the case of Whitbread v. May, in which case the Court was equally divided on the admissibility of parol evidence, adverted to the case of Beaumont v. Fell (1), and to the similar case of Dowset v. Sweet (2), and observed on these cases, that although it was not expressly stated to have been necessary to receive the evidence in order to give effect to the will, yet that ground of determination might be inferred. "It will be found," said the Chief Justice, "that the will would have had no operation unless the evidence had been received. But, in the case now before the Court, the will has an effective operation without the evidence proposed; every thing will pass under it, that is in the manor or parish, or what he would naturally call his Ashton estate. This will be an effective operation; and, this being so, the case in this respect differs from all the others; because in them the evidence was admitted to explain that, which without such explanation could have had no operation. It is safer not to go beyond this line. Only those premises, therefore, will pass under the devise, which are in the manor or parish of Ashton."

In the case of Thomas v. Thomas (3), where the testator had devised to his grand-daughter Mary Thomas of Llechlloyd, in Merthyr parish, it appeared, that at the time of his death he had a grand-daughter of the name of Elinor Evans, one of the lessors of the plaintiff, who lived in the place and parish named in the will, and also a great-granddaughter, Mary Thomas, the defendant, the only person of that name in the family, but who lived in another place, and had never been in Merthyr parish; the plaintiff's

(1) Vid. supr. 411.
(2) Vid. supr. 411.

(3) 6 T. R. 671. And see Lord Walpole v. Lord Cholmondeley, 7 T. R. 138.

counsel

counsel at the trial offered parol evidence to shew, that the person, who drew the will, had made a mistake in the name of the devisee; and Mr. Justice Lawrence received the evidence (1), subject to the opinion of the court above on its admissibility; but as the jury were of opinion, that the name had not been inserted by mistake, and therefore found for the defendant on the first count, which laid the demise from Elinor Evans, the admissibility of this evidence did not afterwards form any part of the argument. After this finding of the jury, the question was between Mary Thomas and the plaintiff on a demise from the heir at law, and in this stage of the cause the defendant's counsel offered evidence of declarations made by the devisor previous to the making of his will, expressive of his regard for the plaintiff, and of his intention of giving her the premises in dispute. But this evidence was rejected, on the ground, that nothing dehors the will could be received to shew the intention of the testator, which could only be collected from the words of the will itself, after the removal of any latent ambiguity in the description of persons or other terms in the will. And this opinion was afterwards affirmed by the court of King's Bench. "If there had been no person," said Lord Kenyon, "to answer the description of grand daughter, living at Llechlloyd, in Merthyr parish, I should have rejected the description, and have said, that the devise applied to Mary Thomas; but it appears, that there is another person answering that part of the description, who is also (in another part of the will) an object of the testator's bounty. Then, as there are two parts of the description not answering to Mary Thomas, who is named in this clause of the will, we are left to conjecture, who was meant by the devisor; but the law will not allow an heir at law to be disinherited by conjecture. And with regard to the other question respecting the rejection of evidence," added Lord Kenyon, "it was properly rejected; the supposed declarations having

(1) See 8 Vin. Ab. 312. pl. 29.; and Hampshire v. Pierce, 2 Ves. 216., cited by Lawrence J. 6 T. R. 678. See ante, p. 412.

been

been made by the testator, long before the will was made: but, had they been made at the time of making the will, I should have thought them admissible evidence."

Patent ambiguity.

If a clause in a deed, or will, or any other instrument, is so ambiguously or defectively expressed, that a court of law, which has to put a construction on the instrument, is unable to collect the intention of the party, evidence of the declaration of the party cannot be admitted to explain his intention; but the clause will be void on account of its uncertainty. In many cases an apparent uncertainty may be removed by collecting the general intention from other passages in the writing, so as to make the whole consistent; or by a reference to some event, or some other writing, or some medium of explanation, adverted to in the instrument. But when, after comparing the several parts of a written instrument, and collecting all the lights which the writing itself supplies, the intention of the parties still appears to be uncertain, parol evidence of their intention is not admissible. "Ambiguitas patens," Lord Bacon (1), (that is, an ambiguity apparent on the deed or instrument,) "cannot be helped by averment; and the reason is, because the law will not couple and mingle matter of speciality, which is of the higher account, with matter of averment, which is of inferior account in law: for, that were to make all deeds hollow, and subject to averment, and so in effect to make that pass without deed, which, the law appoints, shall not pass but by deed. It holds generally," he adds, "that all ambiguity of words within the deed, and not out of the deed, may be helped by construction, or in some cases by election, but never by averment, but rather shall make the deed void for uncertainty."

And in the case of a will, if any devise is expressed doubtfully and with uncertainty, the only construction, which it

(1) Bac. Elem. rule 23.

is capable of receiving, is by comparing it with the other parts of the will; the declarations of the testator are not admissible to remove the apparent ambiguity, or to explain his intention. As, for example, if the devise is to "one of the sons of J. S.," who has several sons, such an uncertainty in the description of the devisee cannot be explained by parol proof (1). So in a case, where the testator made dispositions in his will to several persons, among others to his wife and niece, who were the only women mentioned in the will, and then devised "to her" a particular estate for life, the question was whether parol evidence could be admitted, to shew which of the two was intended; the Lord Chancellor refused to receive it, on the ground that it would tend to put it in the power of witnesses to make wills for testators; the Court held, that though the term "her" was relative, it was to be referred in this case to the wife, because in other parts of the will it seemed to relate to the wife; but expressly excluded the parol evidence offered to explain the will (2). However, courts of law as well as courts of equity will admit evidence of the situation and circumstances of the parties, for the purpose of assisting them in putting a construction on wills, that are not clearly expressed; as, in the case of Masters v. Masters (3), where the testator, after having bequeathed a legacy to the poor of two hospitals in Canterbury, (naming them,) bequeathed another sum in his codicil "to all and every the hospitals," the second bequest was adjudged not to be void for uncertainty, but to have been intended for all the hospitals in Canterbury, as it appeared in evidence, that the testator lived in Canterbury, and had in his will taken notice of two hospitals there. But evidence of the value of the estate devised, or of the amount of the testator's property, will not be admitted in order to raise an argument in favour of a

(1) 2 Vern. 624.

(2) Castleton v. Turner; cited 2 Ves. 217.

(3) 1 P. Wms. 420. See also Harris v. Bishop of Lincoln, 2 P. Wms. 135. Sir J. Eden v. Earl of Bute, 3 Bro. Parl. C. 79. Doe v. Burt, 1 T. R. 701. Selwood v. Mildmay, 3 Ves. jun. 310. 6 Ves. 396. 13 Ves. 174. 15 Ves. 514. Herbert v. Reid, 16 Ves. 481.

particular construction; whatever may be the amount, the general rule of construction must prevail. (1)

A blank in a will, for the devisee's name, is an instance of apparent ambiguity, and parol evidence cannot be admitted to shew what person's name the testator intended to insert (2). But on a bequest to a person, whose surname was mentioned with a blank left for the Christian name, the party who claimed the legacy, was allowed not only to prove acts of kindness and constant affection on the part of the deceased, but to shew further that the testator had said, "he would provide for him, and that he had left him something by his will (3);" and in another case, where only one initial appeared in the will, (the bequest being "to Mrs. G.," without any other description,) the Chancellor referred it to the master to receive evidence, to shew who was the person intended to be described by that initial (4). The distinction between these cases is, that in the former there is no description whatever of a devisee, and whether the testator had selected any person as the object of his devise is entirely uncertain on the face of the will; but in the two last cases, the testator has given some description, and though it would appear too slight and general for the information of strangers, yet to persons, well acquainted with the testator, it might be sufficiently full and distinct; in the first of these two cases, the testator might not have known the Christian name; in the other, the description in the will might have been the only one, by which the testator used to designate the claimant.

When a blank is left in a written agreement, which need not have been reduced into writing, and would have been equally binding, whether written or underwritten,

(1) Doe dem. Handson v. Fyldes, Cowp. 833. Standen v. Standen, 2 Ves. jun. 593. Richardson v. Edmonds, 7 T. R. 635.

(2) Baylis v. The Attorney-General, 2 Atk. 239. Castledon v. Turner, 3 Atk. 257. Hunt v. Hort, 3 Bro. Ch. C. 311.

(3) Price v. Page, 4 Ves. jun. 680.

(4) Abbot v. Massie, 3 Ves. jun. 14.

(as,

(as, if the agreement were to deliver goods to the amount of less than ten pounds, and a blank were left for the quantity of goods to be delivered,) in such a case, it is presumed, in an action for the non-performance of the contract, parol evidence might be admitted to shew the quantity, for which the parties agreed; for a memorandum in writing was not required in this case by the statute of frauds, and the proposed evidence would not contradict any part of the written agreement, but merely supply an omission, where nothing need have been expressed. And where a written instrument, which was made professedly to record a fact, is produced as evidence of that fact which it purports to record, and a blank appears in a material part, the omission may be supplied by other proof. Thus, if a bishop's register were to be produced in evidence, for the purpose of shewing a presentation by a patron, under whom the plaintiff claims, and on the production of the register a blank should appear in the place where the patron's name is usually inserted, the presentation might be proved in some other way (1); as, by a witness, who was present, and heard the presentation. So, in the case of a surrender of a copyhold by a steward, if there is any mistake in the entry, that is only matter of fact, and the courts of law will in that case admit an averment, that there was a mistake either as to the lands or uses. (2)

Usage to explain ancient charters, &c.

In the construction of written instruments, words are to be understood according to their common and general acceptation at the time when the instrument was made (3), and with reference to the nature of the subject. If the language in antient charters is become obscure from its antiquity, or the construction is doubtful, the constant and immemorial usage under the instrument may be resorted

(1) Bishop of Meath v. Lord Belfield, 1 Wils. 215.

(2) Towers v. Moor, 2 Vern. 98.

(3) Vaugh. Rep. 169. Com. Dig. tit. Parols, (A).

to for the purpose of explanation (1), though it can never be admitted to control or contradict the express provisions of the instrument. Such continued usage is a strong practical exposition of the meaning of the parties. Even in the case of an act of parliament, universal usage has been referred to as a proper expositor, where the language is doubtful (2). Lord Coke, in commenting on the statute of Glocester, says, that when any claimed before the justices in eyre any franchises by antient charter, if the words were general, and a continual possession was pleaded of the franchises claimed, or if the claim was by old and obscure words, and the party in pleading expounded them to the court and averred continual possession according to that exposition, the entry was ever *inquiratur super possessionem et usum;* and this, adds Lord Coke, "I have observed in divers records of those eyres, agreeably to that old rule, *optimus interpres rerum usus* (3)." And the uniform course of modern authorities fully establishes the rule, that however general the words of antient grants may be, they are to be construed by evidence of the manner, in which the thing has been always possessed and used (4). Thus, on an information to set aside an election to a perpetual curacy, it appeared that the impropriate rectory, out of which the curacy arose, had been granted in trust for the use of the parishioners and inhabitants of a parish for ever; on the part of the relators it was insisted, that the right of nomination to the vicarage ought to be confined to inhabitants paying scot and lot, or to persons paying to church and poor; and on the part of the defendants, that it extended to all house-keepers in general: Lord Hardwicke, in delivering his judgment, said, "that some sort of limitation was allowed by both sides

(1) R. Varlo, Cowp. 248. Gape v. Handley, 3 T. R. 288. n. R. v. Bellringer, 4 T. R. 810. R. v. Osbourne, 4 East, 333. Bailiff, &c. of Tewkesbury v. Bricknell, 2 Taunt. 120. R. v. Mayor of St. Alban's, 12 East, 559. R. v. Mayor, &c. of Stratford-upon-Avon, 14 East, 348. R. v. Mayor, &c. of Chester, 1 Maule & Selw. 101.

(2) Sheppard v. Gosnold, Vaugh. 169., and see R. v. Scott, 3 T. R. 604.

(3) 2 Inst. 282.

(4) Weld v. Hornby, 7 East, 199. R. v. Osbourne, 4 East, 327.

to have been put by usage on the liberality of the grant, and that in the construction of antient grants and deeds there is no better way of construing them, than by usage; and *contemporanea expositio* is the best way to go by;" and since in this case there was evidence of house-keepers having constantly voted, Lord Hardwicke held, that this usage ought to prevail. (1)

Nor does it make any difference with respect to the admissibility of evidence of immemorial usage, for the purpose of explaining and construing ancient instruments, whether the instrument be a charter granted by the crown, or merely a private deed. Thus, in the case of Withnell v. Gartham (2), where the question was on the construction of an ancient deed, granting the power of appointing a schoolmaster to the minister and churchwardens of a parish, whether all the churchwardens must concur, or whether the act of the majority was sufficient, and the jury found the usage to be in favour of the appointment by a majority, Lord Kenyon, in speaking of the usage and adverting to an argument which had been insisted on, (namely, that the Court ought to reject the evidence of usage, because the instances proved were not as ancient as the deed, and also because usage cannot be let in to explain a private deed,) said, that if the first reason were sufficient to reject the usage, it would be difficult to know how far such an objection might extend. In many cases a party undertakes to prove a custom from the time of legal memory, but that proof is generally established by evidence of facts done at a much later period. And as to the second objection, Lord Kenyon said, there was no difference in that respect between a private deed and a king's charter; in both cases, evidence of usage might be given to expound them. So, in a late case (3), where, in an action for entering the plaintiff's close, the defendant pleaded, that the close was copyhold, and justified

(1) The Attorney-General v. Parker and others, 3 Atk. 576. The Attorney-General v. Forster, 10 Ves. jun. 335.

(2) 6 T. R. 388.

(3) Stammers v. Dixon, 7 East, 200.

under a grant from the lord and by the command of the copyholder, in support of this plea the defendant proved that the person (under whom he justified) and all those, whose estate he had, for a long course of years had constantly taken the forecrop of grass and pasturage from the close, and then by court rolls of the manor proved admissions to a copyhold tenement "of three acres of meadow," (which was admitted to be the close in question,) but every other benefit of the land, except the forecrop, had been enjoyed by those from whom the plaintiff claimed; Mr. Justice Heath, who tried the cause, was of opinion, "that, although the terms of the surrender and admission were sufficiently comprehensive to pass the soil and freehold, yet, as in ancient grants the legal import might be restrained by long and concomitant usage, which might be taken as evidence of the original intent of the parties in making the grant, so here the grant might be restrained by the received usage, and only pass the forecrop, which would not carry the soil." And the Court of King's Bench agreed in this construction of the written evidence. The terms of the admissions, they thought, were not incompatible with the plaintiff's right, and might receive a construction conformable to the usage.

Thus it appears, that the words of an instrument, in themselves conveying a general right to an estate, may in certain cases be limited and restrained by the manner, in which the estate has for a length of time been actually enjoyed. But in the construction of a legal instrument, where the question is, whether a party is bound by his covenant to do a certain act, (as, for example, to grant a renewal of a lease,) courts of law will not consider the acts of the parties or their interpretation of the instrument. In one case, indeed, where it was doubtful, whether a covenant for renewal extended to a perpetual renewal, and the parties had renewed four times successively, the Court of King's Bench held, that the legal effect was a perpetual renewal, on the ground that the parties themselves

selves had, by their own acts, put a construction on the covenant, and that the Court could not say the contrary (1). But this case has been frequently disapproved of (2), and a different rule is now established. "It cannot be a legal mode of construction, (said the Master of the Rolls, in a case of this kind,) that a party who has done an act, which he was not bound to do, or from a mistake, should therefore be bound for ever without the power of retracting." (3).

SECT. II.

Of the Admissibility of Parol Evidence to vary or discharge Written Instruments.

IT is a general rule of law, that parol evidence cannot be admitted to contradict, add to, or vary, the terms of a will, deed or other written instrument. First, with respect to wills;

The statutes of the 32d and 34th of Henry VIII., which gave the power of devising lands by a last will and testament in writing, must clearly have intended, that whatever is effectual and to the purpose, ought to be in writing and sufficient without the aid of words not written; and therefore no parol evidence of the testator's intention can be admitted to controul or enlarge the terms of the will (4). An additional reason for this rule is supplied by the statute of frauds, which enacts, that all devises of lands, &c. must be in writing, and are not revocable except by some other will or codicil, or by some act as cancelling, &c. With regard to wills of personal property, it is evident from the 22d section of the statute of frauds, that no unwritten declarations of the testator can be admitted to vary any bequest; for that section enacts, "that no will in writing Wills.

(1) Cooke v. Booth, Cowp. 819.

(2) Baynham v. Guy's Hospital, 3 Ves. jun. 298. Eaton v. Lyon, 3 Ves. jun. 694. Iggulden v. May, 7 Ves. jun. 333. 2 Bos. & Pull. New Rep. 452. S. C.

(3) Moore v. Foley, 6 Ves. jun. 238.

(4) Brett v. Rigden, Plowd. Com. 345. Lord Cheyney's case, 5 Rep. 68. Bertie v. Lord Falkland, 1 Salk. 231. 2 Vern. 333. S. C.

concern-

concerning goods, chattels, or personal estate, shall be repealed, and that no clause shall be altered or changed, by any words or will by word of mouth only, except the same be in the lifetime of the testator committed to writing, and after the writing read to the testator, and allowed by him, and proved to be so done by at least three witnesses." (1)

Deeds. 2. Parol evidence is not admissible to contradict, or vary, or add to, the terms of a deed (2). "It would be inconvenient," says Lord Coke, "that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controuled by an averment of parties to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers and all others in such cases, if such nude averments against matter in writing should be admitted." In an action of debt therefore on a bond conditioned to pay a sum of money on a certain day, the defendant cannot shew that the bond was intended as an indemnity against another bond. (3)

In an action on a bond a party will not be permitted to shew a condition different from that expressed in the bond; and a conveyance cannot be averred by parol to be to another use or intent than that expressed in the conveyance. But there is a difference in this respect between an use and a consideration. It is an established rule, that a party may aver another consideration, which is consistent with the consideration expressed; but no averment can be made contrary to, or inconsistent with, that expressed in the deed (4). Thus, if a deed of bargain and sale is expressed generally to be made "for divers good considerations," it may be

(1) Brown v. Selwin, Forrest. 240. Lowfield v. Stoneham, 2 Stra. 1261. Cambridge v. Rous, 8 Ves. jun. 22.

(2) Countess of Rutland's case, 5 Rep. 26. Buckler v. Millerd, 2 Ventr. 107. Tinney v. Tinney, 3 Atk. 8. Haynes v. Hare, 1 H. Black. 659.

(3) Mease v. Mease, Cowp. 47.

(4) 2 Roll. Abr. 786. (N), pl. 1. Mildmay's case, 1 Rep. 176. Lord Cromwell's case, 2 Rep. 76. Bedell's case, 7 Rep. 39.

averred,

averred, that the bargainee gave money or other valuable consideration (1). That such an averment may be taken, says Lord Coke, which stands with the deed, although it be not expressly comprised in the deed, is proved by the case of Villers and Beamont (2), where the consideration in a deed of bargain and sale of lands was stated to be a sum of money, but it was averred and found by the jury, that the indenture was made "as well in consideration of marriage (to make it a jointure and bar-dower) as of the said sum of money;" and it was adjudged, that, although there was a particular consideration mentioned in the deed, yet an averment might be made of another consideration, which stood with the indenture, and which was not contrary to it *. A fortiori, adds Lord Coke, the averment

(1) 2 Roll. Ab. 786. (N). 1 Rep. 176. cited (4), ante, p. 424.

(2) 2 Dyer, 146. a. Vernon's case, 4 Rep. 3. S. P. And see Craythorne v. Swinburne, 14 Ves. 170.

* In the case of Villers and Beamont, above cited, (2 Dyer, 146. a.) an elaborate argument is to be found in support of the position, that "where a consideration is expressed in a deed of gift or grant, no other cause can be averred; but if no cause is expressed, that a cause may then be averred out of the deed." The report adds, "that three Judges argued to the contrary, and that the effect of that which is found by the assignment of, 'as well in consideration of the said marriage, &c. as of the sum,' &c. *is contained within the indenture*, and *so* their finding is not contrary to it." In the case of Peacock v. Monk, (1 Ves. 128.) Lord Hardwicke makes the same distinction. A bill in that case was filed, claiming the benefit of a trust under a deed, and the point was, whether the plaintiff could prove a valuable consideration, as no consideration was expressed in the deed. Lord Hardwicke held that the proof ought to be read. "It differed," he said, "from the common case, upon which the objection is founded; for, to be sure, where any consideration is mentioned, as of love and affection only, if it is not said also, 'for other considerations,' you cannot enter into proof of any other; the reason is, because it would be *contrary* to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. But this is a middle case, there being no consideration at all in the deed." All the authorities agree, that, where the deed is not impeached for fraud or other illegal matter, no consideration can be averred or proved *contrary* to that expressed in the deed; and, further, the cases referred to in the text appear to have established, that it is not considered to be contrary to or inconsistent with a deed, to prove another consideration in addition to the consideration expressed.

may

may be made, where no certain consideration is mentioned, but the deed is general "for divers good considerations;" for then the averment (that the bargainee gave money, &c.) is but an explanation and particularizing of the general words of the deed, which include every manner of consideration; and in all these cases, the matter so averred is traversable and issuable. So, where no consideration is expressed in the deed, a party, claiming the benefit of a trust under the deed, may prove a valuable consideration (1). And in a late case, where the question was, whether a settlement had been gained by the purchase of an estate within the statute 9 G. 1. c. 7. s. 5., parol evidence was adjudged to be admissible to shew, that the parties, after having agreed upon twenty-eight pounds as the purchase money, (which was the consideration expressed in the deed of conveyance,) made a subsequent unwritten agreement before the execution of the deed, that the consideration should be thirty pounds, and that the latter sum was actually paid (2). Here the object of the proposed evidence was not to contradict the indenture, but to ascertain an independent collateral fact, namely, whether thirty pounds had been bonâ fide paid as a consideration for the purchase of the estate, upon which fact the settlement would depend.

The authorities, which have been mentioned, appear to establish the rule, that, although a consideration is expressed, some other additional consideration may be shewn, not inconsistent with the former. In one case, indeed, namely, where a deed has been impeached for fraud, the party charged will not be allowed to prove any other consideration, in support of the instrument. Thus, where a bill was filed to set aside as fraudulent a conveyance, expressed to be made in consideration of an annuity, and on the part of the defendants it was objected, that the grantor

(1) Peacock v. Monk, 1 Ves. 128. cited per Cur. in Rich v. Jackson, 6 Ves. jun. 337. n.
(2) R. v. Scammonden, 3 T. R. 474.

of

of the estate had often declared, "he would rather that his kinsman, one of the defendants, should have the estate in consideration of this annuity than any other person for a more valuable consideration, and that he was willing to give the premises to his kinsman;" the Master of the Rolls, after stating that the deed and the answer had put the defence on another ground, declared, that it would be of mischievous consequence and liable to the danger of perjury, which the statute of frauds intended to prevent, to suffer parol evidence to prove blood and kindred to have been the consideration of this conveyance. (1)

The general rule then is, that a party to a deed will be precluded from shewing a condition or consideration contrary to what is expressed in the deed. An exception, however, is always to be made, where the consideration has been illegal, as for simony, usury, compounding of felony, &c. (2); thus, in an action of debt upon a bond, the defendant may plead, that the bond was given for an usurious consideration, though a different and a legal consideration may be recited. And when fraud is imputed, the party, which complains of the fraud, may prove any consideration, however contrary to the averment in the deed, to shew the fraudulent nature of the transaction (3). Thus, where the considerations mentioned in the deed were ten thousand pounds and natural love and affection, the lords commissioners of the great seal directed an issue, to try whether natural love and affection formed any part of the consideration, the estates which were conveyed by the deed being worth thirty thousand pounds. On an appeal this was confirmed; and the jury, on the trial of this issue, finding that natural love and affection constituted no part of the consideration, the deed was afterwards set aside by the Court of Chancery (4). So, when the question is, whether a

(1) Clarkson v. Hanway, 2 P. Wms. 203. 2 Schoal. & Lef. 501.

(2) Buckler v. Millerd, 2 Ventr. 107. Collins v. Blantern, 2 Wils. 347.

(3) Bull. N. P. 173.

(4) Filmer v. Gott, 4 Bro. Parl. C. 234., 2d edit.

person

person has gained a settlement in a parish by purchasing an estate, within the statute 9 G. 1. c. 7. s. 5., evidence is admissible to shew, that less than thirty pounds was the consideration, though the deed of conveyance may express a greater consideration; for that act of parliament says, that no person shall gain a settlement, &c. by virtue of any purchase, unless the consideration for such purchase shall amount to the sum of thirty pounds bonâ fide paid (1). And for the purpose of setting aside a will on the ground of fraud, parol evidence may be given of what passed at the time of the testator's signing, and what the testator said; as in the case of Small v. Allen (2), where it was proved, that the testator at the time of the execution asked, whether the contents of the will were the same as those of a former will, to which he was answered in the affirmative, when in fact the contents were different. So, where indentures or other writings are not available in evidence, unless the consideration paid or contracted for is truly stated, it may be proved that a greater sum than is mentioned was actually paid, or that the writing does not contain the whole of the agreement, but that some of the terms of the agreement were omitted for the purpose of evading the provisions of the stamp acts. In these and similar cases the general reason against admitting parol evidence will not apply; the danger is, not, that the admission of such evidence would introduce uncertainty or fraud, but, that fraud would be assisted by its exclusion, the whole object of the evidence being to expose and defeat a secret fraud.

As a deed takes effect from the time of delivery, not from the time of the date, it may be proved to have been delivered either before or after the day, when it purports to have been made. In an action of debt, therefore, upon a bond, the plaintiff may declare on a bond bearing date on a certain day, and prove the delivery on another day (3);

(1) R. v. Mattingley, 2 T. R. 12. R. v. Olney, 1 Maule & Selw. 387.
(2) 8 T. R. 147.
(3) Goddard's case, 2 Rep. 4. b.

or

or may state in his pleading, that the deed was indented, made, and concluded, on a different day from that on which the deed itself professes to have been indented and concluded. (1)

Extrinsic evidence may sometimes be admitted to establish a customary right, appendant or consequent to other rights established by a deed, though such customary right is not expressed in the deed, provided that it is not inconsistent with any of the stipulations. Thus, it may be shewn, that a heriot is due by custom on the death of a tenant for life, though not expressed in the lease (2). So, a lessee by deed may be entitled to an away-going crop by the custom of the country, though no such right is reserved by the deed. This was determined in the case of Wigglesworth v. Dallison (3), which was an action of trespass for cutting down corn, which the plaintiff claimed as his away-going crop after the expiration of a lease by deed. The jury found the existence of the custom; and it was afterwards moved, in arrest of judgment, that such a custom was repugnant to the deed; and to that effect a case was cited, which had been determined ten years before by Mr. Justice Yates. But the Court of King's Bench held, after a full argument and taking time to consider, that the custom was not repugnant. They considered such a customary right as consequential to the taking, in the same manner as a heriot may be due by custom, though not mentioned in the grant or lease. And the judgment of the Court of King's Bench on this point was afterwards affirmed, on a writ of error, by the unanimous opinion of the Court of Exchequer-chamber.

But no proof will be admitted of such a custom as would vary or add to the stipulations expressed or necessarily implied in the lease. In the case of White v. Sayer (4), a

(1) Stone v. Bale, 3 Lev. 348. Hall v. Cazenove, 4 East, 477.

(2) Per Cur. in White v. Sayer, Palm. 211.

(3) 1 Doug. 201.

(4) Palm. 211.

custom

custom for a lord of a manor to have common of pasture in all the lands of his tenants for life or years was held void and against law, "for that it is part of the thing demised," and consequently the custom would be contrary to the lease. And in Doe on the demise of Strickland v. Spence (1), it having been observed, among other things, in argument, that "the custom of the country might be let in as evidence of the holding where no express contract appeared, (though it could not govern the case then before the Court,)" Lord Ellenborough C. J. observed, that "the agreement to quit *according to the time of entry* is no more than the law would have implied, if it had not been so expressed;" and Mr. Justice Le Blanc added, that "the custom of the country would not make the tenant quit at a different time from that at which he entered;" from which it may be properly inferred, that when a lease has expressly fixed the time of entry, it implies so strongly and necessarily the time of quitting, that a custom cannot be set up, to establish a different time of quitting, without contradicting the lease.

Yet, in the case of Doe on the demise of Dagget v. Snowden (2), the court of Common Pleas are reported to have said, that, in a lease for years, if there is a taking from Old Lady-day, the custom of most countries would allow the lessee to enter on the arable land at Candlemas, to prepare it for Lent corn; and on the meadows not before May-day, when, in the northern counties, they are usually heyned in for hay. The point was not immediately before the Court; but, considering this dictum as a decision, it may perhaps be understood to imply, that a general time of entry in a lease refers to what the court called in that case, and what has since been called (3), the *substantial* time of entry, that is, to the time of entry on the principal subject of the demise; that

(1) 6 East, 122.
(2) 2 Black. Rep. 1225.
(3) See Doe v. Spence, 6 East, 120. Doe v. Watkins, 7 East, 551. Doe dem. Heapy v. Howard, 11 East, 498.

this

this does not necessarily involve the time of entry on the subordinate or accessory subjects of demise; that with respect to the latter, therefore, a lease, which mentioned only a general time of entry, might be considered as silent; and, consequently, that evidence of custom might be admitted concerning these subordinate parts, without contradicting the terms of the lease. Even thus explained, however, the opinion of the court on this point seems to carry the principle of letting in proof of custom, to explain or vary written agreements, much farther than it has been admitted in any of the later decisions.

Agreeably to the rules already mentioned, if, in a deed, a word of description is used, to which the law affixes a certain sense, it should seem, that evidence cannot be admitted to shew, that, by the custom of the county, the word bears a sense different from its ordinary legal acceptation, unless where the deed expressly refers to such customary or peculiar sense. It was, indeed, ruled by Lord Kenyon C. J. in a case at nisi prus (1), that, where the holding of certain lands in the city of Canterbury was from Michaelmas to Michaelmas, evidence was admissible to shew that, by the custom of the county of Kent, all demises to hold "from Michaelmas" commenced at Old Michaelmas. But the authority of this case seems overturned by that of Doe on the demise of Spicer v. Lea (2). One of the questions there was, whether a lease from Michaelmas generally, which primâ facie must be taken to mean New Michaelmas, was capable of being shewn by extrinsic evidence, (such as the fact of a previous holding by the same tenant, and the understanding of the parties,) to mean Old Michaelmas. And to support the affirmative, the decision, already mentioned, of Lord Kenyon at nisi prius, was cited and relied on. But the court of King's Bench were of opinion, that no extrinsic evidence could be given to explain the time of holding stated in the deed, which

(1) Forley dem the Mayor of Canterbury v. Wood, cited in 11 East, 313.

(2) 11 East, 312.

must

must be taken to be from New Michaelmas, since the act of parliament for altering the style; unless, as Lord Ellenborough C. J. observed, there had been some reference in the deed itself to the prior holding. The same principle which governs the last case seems equally applicable to agreements to sell a certain number of acres of land generally, in which case the acres are to be computed, not according to the custom of the place, but by the statute measure (1); though it must be confessed that, in some cases, where the number of acres may be thought to have been put rather by way of description than measurement, or where some other grounds (not, indeed, very definable) appeared for an exception to the general rule, they have been computed according to the general understanding of the country (2). And, from analogy to the rule above mentioned, on a sale of so many bushels of corn generally, (supposing, that a custom to sell by any other than the Winchester measure were not illegal and void (3),) it might, perhaps, be laid down, notwithstanding a dictum in an old case to the contrary (4), that the bushel must be intended to mean not the customary but the statute bushel (5). It appears, indeed, to be a general principle, that when a word is used which has a legal meaning, it must be understood in its legal acceptation. (6)

Mercantile contracts.

3. Policies of insurance, though not specialty contracts, are within the same rule, and cannot be contradicted or varied by any unwritten agreement made by the parties previous to the time of signing the policy. Thus, in an early case, where, in an action on a policy of insurance from Archangel to Leghorn, the defendant attempted to shew, that the agreement before the subscription of the

(1) Wing v. Earle, Cro. El. 267. Morgan v. Tedcastle, Poph. 55. Waddy v. Newton, 8 Mod. 276., and see 3 T. R. 274.

(2) Morgan v. Tedcastle, Poph. 55. 2 Roll. Rep. 67. Sir J. Bruin's case, cited 6 [illegible]. 67. Some v. Taylor, Cro. El. 665.

(3) See R. v. Major, 4 T. R. 750. Master, &c. of St. Cross v. Lord Howard de Walden, 6 T. R. 338.

(4) Per Croke J. in Floyd v. Bethill, 1 Roll. Rep. 420.

(5) Hockin v. Cooke, 4 T. R. 314.

(6) 6 T. R. 344.

policy

policy was, that the adventure should begin only from the Downs, the Court would not admit the evidence (1). Lord Chief Justice Pemberton in that case said, that policies were sacred things, and that a merchant should no more be allowed to go from what he had subscribed in them, than he, who subscribes a bill of exchange payable at such a day, shall be allowed to go from it and say, it was agreed to be on condition, &c., when it may be, that the bill had been negotiated; for though neither of them are specialties, they are of great credit, and much for the support and advantage of trade.

The same rule of course applies to charter-parties; for they are under seal. Therefore, in a nisi prius case, where a ship was chartered to wait for convoy at Portsmouth, Lord Kenyon would not suffer a parol agreement to be set up on the other side to substitute Corunna for Portsmouth (2). And this doctrine was sustained by the court of King's Bench in the case of White v. Parkin (3), though they held that it did not apply to that particular case.

Upon the same principle, in an action on a promissory note or bill of exchange, the defendant will not be allowed to give evidence of an agreement, between him and the plaintiff, at the time of making the note, that it should be renewed, and that payment should not be demanded on its becoming due (4). So, in the case of contracts of hiring between masters of ships and seamen, (though they are directed by statute to be in writing under a penalty to be inflicted on the master, and it has not been decided that they are void, if unwritten,) still, when once reduced into writing, they cannot be varied or added to by parol. Thus, it was ruled in the court of Common Pleas, that a

(1) Kaines v. Knightly, Skin. 54. S. C., referred to in Bates v. Grabham, 2 Salk. 444, but mis-stated. Weston v. Emes, 1 Taunt. 115. Uhde v. Walters, 3 Campb. 16.

(2) Leslie v. De la Torre, cited 12 East, 583.

(3) 12 East, 578.

(4) Hoare v. Graham, 3 Campb. 57. Hogg v. Snaith, 1 Taunt. 347.

mate in a slave-ship could not, on the ground of a verbal promise, claim the perquisite of the price of a negro slave beyond the wages due to him by certain written articles of agreement executed between the master, officers, and crew. (1)

However, it has been long determined by a variety of cases, that mercantile contracts, such as policies of insurance, charter-parties, and others of a like nature, are to be construed conformably with the usage and custom of merchants. On mercantile contracts relating to insurance, said Lord Hardwicke, in a case before him, courts of law examine and hear witnesses, of what is the usage and understanding of merchants conversant therein; for they have a style peculiar to themselves, which is short, yet is understood by them, and must be the rule of construction (2). Thus, where an insurance was on a ship from London to the East Indies, warranted to depart with convoy, the Court held, that this clause of warranty must be construed according to the usage among merchants, that is, from such place where convoys are to be had, as from the Downs (3); so, where the insurance is on goods till landed, and the defence is, that the plaintiff has been guilty of unreasonable delay in landing, the question can only be decided by knowing the usual practice of the trade, with which every underwriter is supposed to be acquainted, whether the practice has been recently or long established. (4)

It has indeed been doubted by judges of the highest authority, whether the practice of admitting such evidence has not been carried to an inconvenient length. In the late case of Anderson v. Pitcher (5), Lord Eldon C.J. expressed himself in the following terms: " It is now too late to say,

(1) White v. Wilson, 2 Bos. & Pull. 116.

(2) 1 Ves. 459. 2 Ves. 331. And see Uhde v. Walters, 3 Campb. 16.

(3) Lethulier's case, 2 Salk. 443.

(4) Noble v. Kennoway, 1 Doug. 510. Vallance v. Dewar, 1 Camp. 503.

(5) 2 Bos. & Pull. 168.

that this warranty is not to be expounded with due regard to the usage of trade. Perhaps it is to be lamented, that in policies of insurance, parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great judge Lord Holt (1). It is true, indeed, that Lord Mansfield, who may be considered the establisher, if not the author, of a great part of this law, expressed himself thus: 'Wherever you render additional words necessary and multiply them, you also multiply doubts and criticisms (2).' Whether, however, it be not true, that as much subtilty is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were res integra, be reasonably questioned."

But though the usage of merchants, with reference to which the parties are supposed to contract, may be frequently resorted to for explaining or defining the terms of a policy, it is not, therefore, to be supposed that this species of contract is not subject to the same rules of construction as are applicable to other written instruments. The same rules of construction apply to every kind of contract. The terms of a policy are to be understood in their plain, ordinary, and proper sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the words; or unless the context evidently points out, that they must in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense (3). Proof of usage is not admissible to contradict the plain unequivocal language of a policy; and therefore in an action on a policy of insurance "on the ship till moored at anchor twenty-four hours, and on the goods till discharged and safely landed," evidence having been ad-

(1) Lethulier's case, 2 Salk. 443.
(2) Lilly v. Ewer, 1 Doug. 74.
(3) Per Lord Ellenborough C. J. in delivering judgment in Robertson v. French, 4 East, 135.

 mitted,

mitted, that by the custom of the trade the risk on the goods, as well as on the ship, expired in twenty-four hours, the Court of King's Bench granted a new trial on that ground, and on the new trial the evidence was rejected. (1)

This doctrine of admitting evidence of usage to explain and construe mercantile contracts is strongly illustrated by the case of Cutter v. Powell (2), which was an action of assumpsit brought by an administratrix for work and labour done by the deceased. It appeared that the captain of a ship had given a note to the deceased, by which he promised to pay a sum of money to the deceased, provided that he proceeded on a voyage, and continued to do his duty as second mate, to the port of destination. The second mate died on the voyage, and the question was, whether the plaintiff could recover in this general action any portion of the wages for the time the deceased had served. An inquiry had been made by the direction of the Court relative to the usage of merchants on this kind of agreement; but no settled usage could be ascertained one way or the other. Lord Kenyon in delivering his opinion, after stating, that the deceased stipulated to receive the larger sum if the whole duty were performed, and, unless the whole were performed, to receive nothing, added, that on this particular contract his opinion was at present formed; at the same time, said Lord Kenyon, if we were assured that these notes are in universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my opinion. And Mr. Justice Lawrence said, "with regard to the common case of an hired servant, to which this has been compared, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he does not continue in the service during the whole year. So if the plaintiff in this case

(1) Parkinson v. Collier, sitt. after Mich. 1797, Park. Insur. 416.

(2) 6 T. R. 320.

could have proved any usage, that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, the plaintiff cannot recover any thing."

4. The same rule applies to all written agreements, which the statute of frauds requires to be in writing. They cannot be contradicted, or added to, or substantially varied by parol evidence (1); for such evidence would defeat the statute, and introduce that uncertainty, which it was the object of the legislature as far as possible to suppress. Where the rent for a house was specified in a written agreement to be twenty-six pounds a year, and the landlord in an action for use and occupation proposed to shew by parol evidence, that the tenant had also agreed to pay the ground-rent, the Court refused to admit the evidence (2). * So, where a tenant, having paid the land-tax, brought an action to recover it back from his landlord, and gave in evidence a written memorandum of agreement in the plaintiff's hand-writing, which specified the rent and terms, but was silent respecting the payment of taxes, the defendant offered parol evidence, that, previously to the drawing up

Agreements within the statute of frauds.

(1) Binsted v. Coleman, Bunb 65. Parteriche v. Powlet, 2 Atk. 383. Meres v. Ansell, 3 Wils. 275. Wain v. Warlters, 5 East, 10.

(2) Preston v. Merceau, 2 Black. 1249.

* In the case of Preston v. Merceau, above cited, Mr. Justice Blackstone, after stating, that the Court could neither alter the rent nor the term, the two things expressed in the agreement, is reported to have added, "that with respect to collateral matters it might be different; the plaintiff might shew, who was to put the house in repair, or the like, concerning which nothing is said." But this opinion is not consistent with the principle established in Meres v. Ansell (3 Wils. 275.), Rich v. Jackson (4 Bro Ch. C. 515.), Powell v. Edmunds (12 East, 6.), and several other cases above mentioned, which plainly shew, that parol evidence is not admissible either to vary or add to the terms of the written agreement. To add a new term, or to define what was before indefinite, is in effect to make a material variation.

of the memorandum, it had been mentioned and was understood by the parties, that the rent was to be paid clear of all taxes; this evidence was rejected, and the Court of Common Pleas afterwards, on a motion for a rule to shew cause why the verdict should not be set aside, adjudged the evidence to be inadmissible, and refused the rule. (1)

Upon the same principle, the verbal declarations of an auctioneer at the time of sale are not admissible in evidence for the purpose of varying, or adding to, or explaining the printed conditions of sale (2). Thus, where the conditions described only the number and kind of timber trees to be sold by lot, but said nothing as to the weight of the timber, the defendant, in an action for not completing his purchase according to the conditions, was not allowed to prove, that the auctioneer at the sale had warranted the quantity of timber to amount to a certain weight, and the Court of King's Bench was of opinion, that this evidence had been properly rejected (3). Lord Ellenborough said, that "the purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, in what instance might not a party by parol testimony superadd any term to a written agreement? which would be setting aside all written contracts, and rendering them of no effect. There is no doubt, that the warranty as to the quantity of timber would vary the agreement contained in the written conditions of sale."

So, when a contract is made for the sale of goods, and the bargain has been reduced into writing, pursuant to the 17th section of the statute of frauds, parol evidence would not be admitted to shew that the parties agreed to vary the quantity of goods to be delivered. But the rule is different

(1) Rich v. Jackson, 4 Bro. Ch. C. 515. 6 Ves. jun. 334. n. S. C.

(2) Gunnis v. Erhart, 1 H. Bl. 289. Jenkinson v. Pepys, cited 6 Ves. jun. 330. Higginson v. Clowes, 15 Ves. jun. 516. Clowes v. Higginson, 1 Ves. & Beam. 524.

(3) Powell v. Edmunds, 12 East, 6.

ferent with respect to the time of delivery, or the particular mode of delivery, which are not essential parts of the contract, but are frequently expressed in the memorandum, together with the quantity and the price of the goods, in order the more easily to carry the contract into execution; proof of a verbal agreement has therefore been allowed to prolong the time limited in a written contract for the delivery of a certain quantity of barley (1), on the ground that it was only a continuance of the original contract, a forbearance on the part of the plaintiff for a longer time. And in a very late case (2), where the question was, whether, after a part-delivery of goods, which by a written contract were to be delivered at fixed times, a verbal agreement to extend the time for the delivery of the remainder was good, the Court of King's Bench held that it was good; for this was not a parol variation of the contract, but what had been done was only in performance of the original contract; the parties agreed to a substitution of other days instead of those originally specified for its performance, but still the contract remained.

It has before been observed, that where no consideration is expressed in a deed, a consideration may be proved. But in some particular cases within the statute of frauds, the consideration must be stated in the written memorandum, and if it is not stated, the defect cannot be supplied by parol evidence; thus, in the case of Wain v. Warlters (3), which was an action on a promise to pay the debt of a third person, the Court of King's Bench held, that the memorandum signed by the defendant ought to have expressed the consideration of the promise as well as the promise itself, and, the consideration being omitted, that the plaintiff was not entitled to recover; for the 4th section of the statute of frauds enacts, among other things,

(1) Warren v. Stagg, ruled by Buller J., cited in 3 T. R. 591.
(2) Cuff v. Penn, 1 Maule & Sel. 21.
(3) 5 East, 10. As to this case, see Stadt v. Lill, 9 East, 348. Ex parte Minet, 14 Ves. jun. 190. Ex parte Gardom, 15 Ves. 287. Bateman v. Phillips, 15 East, 272.

that no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless *the agreement*, upon which such action is brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged *, &c.; and the Court of King's Bench held, in the construction of this clause, that the word "agreement" must be understood in its proper and correct sense; and that, as the consideration for the promise is part of the agreement, this ought also to be stated in writing. The same reasoning applies to all other cases within the fourth section, as where an action is brought on an agreement in consideration of marriage, or on any contract for an interest in land, or upon any agreement not to be performed within a year. It will not follow from the case of Wain v. Warlters, that the plaintiff cannot recover, unless the agreement is signed by *all the parties* to be bound; for though an agreement in its legal signification means "a mutual assent to do a thing, which ought to be so certain and complete, that each may have an action upon it (1)," yet the clause of the statute by stating expressly, "that no action shall be brought (whereby to charge, &c.), unless the agreement shall be in writing, and *signed by the party to be charged therewith*," implies that the other party may recover upon it without having signed

(1) Com. Dig. tit. Agreement.

* St. 29 C. 2. c. 3. s. 4. enacts, "that no action shall be brought, whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate — or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person — or to charge any person upon any agreement made upon consideration of marriage — or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them — or upon any agreement, that is not to be performed within the space of one year from the making thereof — unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

it.

it (1). Nor are the words of the statute to be construed so strictly, as to make it necessary to state precisely, in the memorandum of the agreement for paying the debt of another person, what is the exact amount of the debt: but it will be sufficient to engage to pay generally, for all the goods furnished within a certain time, or whatever sum the person may owe, &c., and the amount of the goods furnished, or of the debt contracted, is to be ascertained by evidence at the trial (2). In a late case of this kind (3), where the promise to pay was made by the defendant in a letter addressed by him to one G., (in which he undertook, in case G. would give the bearer D. W. indulgence for a certain time, to see him paid,) the Court of King's Bench were of opinion, that the evidence of G. had been properly admitted to prove, what was the amount of the debt, and also that he had been applied to by the defendant, as the attorney of the plaintiff, who employed him to sue D. W. for the debt owing to the plaintiff. The 17th section of the statute relating to contracts for the sale of goods, as well as the fourth, makes a written memorandum necessary in certain cases *, but it requires only a note or memorandum in writing of the *bargain*, not a memorandum of the *agreement*; and under this section, it has been determined that the written memorandum need not express the consideration for the sale. (4)

5. By the rule of law, independently of the statute of frauds, parol evidence cannot be received to contradict a

Contracts not within the statute of frauds.

(1) See 6 East, 308. and the cases on this subject collected in Mr. Sugden's Tr. on the law of Vendor and Purchaser, 4th edit. p. 64.

(2) 15 East, 274.

(3) Bateman v. Phillips, 15 East, 272.

(4) Egerton v. Matthews, 6 East, 307.

* St. 29 C. 2. c. 3. s. 17. enacts, "that no contract for the sale of any goods wares, and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

written

written agreement; the written instrument must be considered as containing the true agreement between the parties, and as furnishing better evidence than any which can be supplied by parol (1). The reason, assigned by Lord Coke, against admitting parol evidence to contradict the terms of a deed, is very general, and applies to the case of a written agreement, though no writing may have been absolutely necessary. "It would be inconvenient," he says, "that matters in writing, made on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of the parties, to be proved by the uncertain testimony of slippery memory (2)." Thus, where there has been a contract in writing for the sale of goods, specifying the quantity and the price, neither of the contracting parties would be allowed to give evidence of conversations previous to or at the time of making the bargain, for the purpose of proving that the price was to be different, or that a different quantity was to be delivered; for this evidence would directly contradict the written memorandum, which must be considered as expressing the final intention and understanding of the parties at the time of the contract. For the same reason, if the time of carrying away the goods is not expressed in the agreement, (and therefore a reasonable time is allowed,) evidence will not be admitted, that the purchaser verbally agreed to carry them away immediately after the purchase (3). But if it was not necessary in the first instance to have the bargain reduced into writing, evidence of conversations *subsequent* to the time of making the agreement would probably be admitted, to shew that the parties agreed afterwards to vary the contract, or add some new stipulation. Here the written agreement, so far as it purports to express the true meaning of the parties, that is, down to the time of its being concluded, is not in any manner contradicted or impugned; but from

(1) 2 Atk. 383. 2 Bro. Ch. C. 219. 7 Ves. jun. 218. 4 Taunt. 786.

(2) 5 Rep. 26.

(3) Greaves v. Ashlin, 3 Campb. 426.

the

the proposed evidence it would appear, that they afterwards varied or added to the contract; which is not inconsistent with any thing contained in the original agreement. Lord Hardwicke is reported to have said in a case before him (1), that "to add any thing to an agreement in writing by admitting parol evidence, which would affect land, is not only contrary to the statute of frauds, but to the rule of common law, before that statute was in being." It is not, however, expressly stated in the report of the case before Lord Hardwicke, whether the circumstance, to which the parol evidence related, was previous or subsequent to the signing of the agreement; but it seems rather probable, from the nature of the case, that it was previous.

And though an ambiguity apparent on the face of a written instrument cannot be explained by extrinsic evidence, yet, where a question arises as to the general intention of the parties, concerning which the instrument is not decisive, it has been held, that proof of independent facts collateral to the instrument may be properly admitted. Thus, in the case of King v. Laindon (2), where, on a question between two parishes respecting the settlement of a pauper, it appeared, that the pauper agreed to serve a person three years to learn the business of a carpenter, and evidence was admitted at the sessions, that, at the time of making this agreement, the pauper agreed also to give a sum of money as a premium to be taught the trade; that he paid the money, and that he was not to be employed, nor was he employed, in any other work than that of a carpenter; the court of King's Bench held, that the evidence was properly admitted, as it was not offered to contradict the written agreement, but to ascertain an independent fact collateral to the written instrument, in order to explain the intention of the parties, the

(1) Parteriche v. Powlet, 2 Atk. 384. See Clinan v. Cooke, 1 Schoal. & Lef. 35.

(3) 8 T. R. 379. And see 14 Ves. 170.

instrument

instrument being in some measure equivocal. It does not distinctly appear from the report, whether the fact alluded to was the verbal agreement, (by which the pauper agreed to pay a premium, and stipulated that he was to do only carpenter's work,) or only the payment of a certain sum of money by the pauper to the master at the time, when the agreement was made. But from the opinions expressed by the Court, in which the evidence of the verbal agreement was not adverted to, it may be inferred, that the latter fact alone was adjudged to be admissible. Lord Kenyon said, "The evidence was offered to ascertain an independent fact, and I think it was properly received in evidence. That being so, the case appears to be shortly this: *in consideration of three guineas paid by the pauper, the master undertook to teach him the business of a carpenter, and the pauper was to serve three years.*" Mr. Justice Lawrence expressed himself nearly in the same words; and Mr. Justice Le Blanc concurred in opinion with the Court, that the parol evidence was admissible, as evidence of a fact collateral to the written instrument. (1)

Parol agreements discharged by parol.

A deed cannot be discharged or revoked by parol; for every contract or agreement, says Lord Coke, ought to be dissolved by matter of as high a nature as the first deed; nihil tam conveniens est naturali æquitati, quam unumquodque dissolvi eo ligamine, quo ligatum est (2). But it appears to be generally understood, that executory agreements in writing, not under seal, may before breach be discharged and abandoned by a subsequent unwritten agreement, as well in cases where the original contract is required by the statute of frauds to be in writing, as where writing is unnecessary. The reason, above cited from Lord Coke's reports, applies only to agreements by specialty. Agreements, not by specialty, whether written or unwritten, are classed on the same level, and denominated

(1) See also 14 East, 544.

(2) 5 Rep. 26. a. 3 Lev. 234. Blake's case, 6 Co. Rep. 44. a. Braddick v. Thompson, 8 East, 344.

agree-

agreements by parol; there is no such third class recognized by the law of England as contracts in writing not under seal; if they are merely written and not specialties, they are called parol (or, more properly, simple) contracts (1). It follows, therefore, that to admit evidence of an unwritten agreement, for the purpose of shewing an abandonment or discharge of a previous written agreement, would not be to dissolve the agreement by matter of an inferior nature. Nor does the statute of frauds contain any provision respecting the dissolution of agreements; it prescribes the manner of revoking wills, and in many cases makes a written memorandum necessary in order to establish and enforce agreements, but as to the discharge or abandonment of executory agreements the statute is entirely silent, leaving the case as it stood at common law. The 17th section enacts, in certain cases, that "*a contract for the sale of goods* shall not be allowed to be good, unless some note or memorandum, in writing, of the bargain shall be made and signed," &c.; but an agreement to waive that contract, before breach, is not a contract for the sale of goods, and may therefore be binding, though not reduced into writing. So, the fourth section enacts, that "no action shall be brought *upon any contract or sale of lands*, &c., or any interest in or concerning them, unless the agreement, upon which the action shall be brought, or some memorandum or note thereof shall be in writing," &c.; this is very different from enacting, that all contracts or agreements *concerning* land shall be in writing, terms so general and comprehensive that, if they had been introduced into the act, they might be considered as including an agreement for the waiver of a purchase contract, as well as the original agreement itself; the section only provides, that "*no action shall be brought upon any contract or sale of lands,*" &c., but it does not proceed to enact, in case an action is brought, and the defence set up is a dissolution and abandonment of the agree-

(1) Rann v. Hughes, 7 T.R. 350. n.

ment,

ment, that some note or written memorandum is also necessary to give effect and validity to such subsequent agreement.

On a bill filed in a court of equity for the specific performance of a written agreement, it appears to be the better opinion, that the defendant may insist, that the agreement has been since discharged merely by parol between the parties (1). In the case of Buckhouse and Crossby (2), indeed, where a bill was filed for the specific performance of a contract for the sale of an estate, and the defendant insisted that the contract had been discharged by parol, in support of which the case of Goman v. Salisbury was cited as an authority, Lord Hardwicke is reported to have declared, that, "though he would not say, that a contract in writing could not be waived by parol, yet he should expect in such a case a very clear proof, and the proof in the case before him he thought very insufficient to discharge a contract in writing;" Lord Hardwicke then observed, that the statute of frauds requires, "that all contracts and agreements concerning land should be in writing, and that an agreement to waive a purchase-contract is as much an agreement concerning land as the original contract; however, there was not occasion then to determine the point *."

And

(1) Goman v. Salisbury, 1 Vern. 240., cited and approved by Sir J. Strange in Legal v. Miller, 2 Ves. 299., and in Pitcairne v. Ogbourne, 2 Ves. 376., and cited by Lord Chancellor Redesdale in 1 Schoal. & Lef. 39. 2 Ves. 299. S. P. 1 Ves. jun. 404. S. P. 17 Ves. jun. 356. S. P.

(2) Eq. Cas. Ab. 32.

* In this case of Buckhouse and Crossby, the waiver was not between the purchaser and vendor, but between a former and a subsequent purchaser. The material facts of the case will be found to be, that A. seised of lands in fee simple mortgaged them to the defendant, and afterwards authorized his attorney to sell the estate, who sold it by parol agreement to the plaintiff; A. being informed of this, wrote to the plaintiff, acquainting him, that he accepted the purchase-money; afterwards A. by letter offered the estate for the same money to a third person, who agreed with A. for the purchase on behalf of the defendant, and accordingly A. by indenture conveyed the premises to the defendant, in consideration of 300 guineas then paid. Before this conveyance, C., who treated

for

And in the case of Bell v. Howard (1), Lord Hardwicke, after noticing an objection on the part of the defendant against decreeing an execution of written articles for the sale of an advowson, (namely, that the plaintiff had waived the articles,) is reported to have said, that "it was certain an interest in land could not be parted with or waived by naked parol without writing;" but added, "that articles may by parol be so far waived, that if the party come into a court of equity, to have a specific execution of them, such parol-waiver will rebut the equity which the party before had, and prevent the court from executing them specifically." But, in the last case on this subject (2), where the plaintiff prayed a specific performance of an agreement for a lease, under which the plaintiff had taken possession, and afterwards, as the defendant stated in his answer, the parties mutually abandoned the terms of the written agreement, and made another agreement by parol, the Master of the Rolls, observing upon the argument for the defendant, "that the agreement was waived, and that a written agreement may be so far waived by parol, that the Court will refuse the interposition of its equitable jurisdiction to enforce it," said, that as he conceived there was not in the case before him any waiver within the meaning of the dicta or the decisions upon the subject, it was not necessary for him to give any precise opinion upon the point; "but," he added, "as at present advised, I incline to think upon the doctrine of this court, such would be the effect of a parol waiver clearly and satisfactorily proved. The waiver spoken of in the cases is an entire abandonment and dissolution of the contract, restoring the parties to their former

(1) 9 Mod 302.

(2) Price v. Dyer, 17 Ves. 356. 363. See also 9 Ves. 250.

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for the purchase on behalf of the defendants, had notice of the plaintiff's title, but being examined as witness for the defendant, swore that, before the conveyance was executed to him, the plaintiff agreed, that all prior contracts between him and A. should be void; and that it should be referred to A., whether the plaintiff or the defendant should be the purchaser, and that A., being written to, gave the preference to the defendant.

situation.

situation. No such thing was for a moment in the contemplation of the parties. All that they at any time meant was to add to or modify the terms of the original agreement." The bill was accordingly dismissed, but without costs.

Sect. III.

Of the Rule in Courts of Equity, respecting the Admissibility of Parol Evidence.

The rules of evidence in courts of equity are the same as in courts of common law; and it is a general principle, established in the former, no less than in the latter, that parol evidence of the intention of the parties is not admissible to vary or add to the terms of a written agreement (1). If the agreement is certain, explained in writing, and signed by the parties, that binds them; if it is not certain, and parol evidence is necessary to prove what the terms were, to admit such evidence would effectually break in upon the statute of frauds, and introduce all the mischief, inconvenience, and uncertainty, which the statute was designed to prevent (2). In the case of Rich v. Jackson (3), therefore, on a bill for specific performance, the Court of Chancery gave the same judgment against the admissibility of parol evidence varying a written contract, as had been previously given by the Court of Common Pleas in an action between the same parties. "The question," said Lord Rosslyn in that case, "is, whether in equity any more than at law such evidence ought to be admitted; whether there is any distinction in a court of equity, where a party comes to enforce a written agreement by obtaining a more formal instrument, and to add, in doing that, a term not expressed in the written agreement, and of such a nature as to bear against the written agreement?

(1) Fell v. Chamberlaine, 2 Dick. 424. Hare v. Shearwood, 1 Ves. jun. 241. Jordan v. Sawkins, 3 Br. Ch. C. 388. 1 Ves. jun. 402. S. C. Jackson v. Cator, 5 Ves. jun. 688.

(2) Per Buller J., Brodie v. St. Paul, 1 Ves. jun. 333.

(3) Vid. sup. 438.

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I have looked into all the cases, and cannot find that this court has ever taken upon itself, in executing a written agreement by a specific performance, to add to it by any circumstance that parol evidence could introduce."

There are certain exceptions to this general rule, the principal of which will be briefly considered in the following section. First, it will be inquired, in what cases a *defendant* may prove by parol evidence a variation in a written agreement, contrary to the intention of the party; secondly, whether a *plaintiff* may produce such evidence. Some cases will then be mentioned, in which extrinsic evidence has been admitted, to rectify mistakes in deeds, and for the purpose of raising trusts in wills.

1. When a court of equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party *to be charged* is admitted to shew, that under the circumstances the plaintiff is not entitled to have the agreement specifically performed (1). The admission of such evidence as matter of defence is very frequent; it is used to rebut an equity. The defendant says, "the agreement which you seek, is not the agreement which I meant to enter into;" and then he is let in to prove fraud or mistake (2). For the Court will not grant a decree for specific performance, unless it is satisfied, that under all the circumstances it is equitable to give more relief, than the plaintiff is entitled to at law.

The statute of frauds has not altered the situation of a defendant, against whom a specific performance is prayed; and he may give the same evidence now, which he might have given before (3). For the words of the statute are, that "no person shall be charged upon any contract or sale of lands, &c., unless the agreement or some memoran-

(1) 7 Ves. jun. 219.
(2) 1 Schoal. & Lef. 39.
(3) 14 Ves. jun. 524.

dum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." No person, then, can be charged with the execution of an agreement, who has not either by himself or his agent signed a written agreement; but the statute does not say, that, if a written agreement is signed, the same exception to it may not be taken as before the statute. Now before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, "that is not the agreement meant to have been signed." Such a case is left as it was by the statute; the statute does not say that a written agreement shall bind, but that an unwritten agreement shall not bind. (1)

The general principle, to be deduced from the various authorities on this subject (2), appears to be, that a defendant in answer to a bill for a specific performance may suggest, and prove by parol evidence, that by reason of fraud, surprise, or mistake, the written instrument does not correctly and truly express the agreement, but that there is an omission or insertion of a term, or some material variation, contrary to the intention and understanding of the parties.

The defendant may be admitted also to prove by parol evidence, that, after signing the written agreement, the parties made a verbal agreement varying the former; provided those variations have been so acted upon, that the original agreement can no longer be enforced without a fraud upon the defendant. Thus, in a case where there was a written agreement for the lease of a

(1) See Lord Redesdale's judgment in the case of Clinan v. Cooke, 1 Schoal. & Lef 39.

(2) Joynes v. Statham, 3 Atk. 388. Marquis of Townsend v. Stangroom, 6 Ves. jun. 328. Woollam v. Hearn, 7 Ves. jun. 211. Clarke v. Grant, 14 Ves. jun. 524. Ramsbottom v. Gosden, 1 Ves. & Beam. 165. Winch v. Winchester, 1 Ves. & Beam 375.

house,

house, at the annual rent of 32*l.*, and that the owner of the house should put it in repair; it was afterwards discovered, that the house was not worth repairing, and without any alteration of the agreement the house was in consequence pulled down with the consent of the tenant, who was apprised of the great expence, which the landlord must necessarily have incurred in making the repairs; the tenant then made a verbal agreement to add 8*l.* per annum to the 32*l.*, provided the house should be rebuilt; and on a bill brought by the tenant for a specific performance of the lease, on the foot of the written agreement to pay 32*l.* rent, the defendant in his answer set up the parol agreement (1). Here the original agreement was unexceptionable, but the execution of it under the new circumstances would have been a fraud upon the landlord; the landlord having rebuilt instead of repairing the house, and the tenant having agreed to pay an additional rent in consideration of the additional expence. But variations, verbally agreed upon, are not sufficient to prevent the execution of a written agreement, where the situation of the parties in all other respects remains unaltered. (2)

2. Whether a *plaintiff* in equity, on a bill for the specific performance of a written agreement, can in any case be admitted to prove, that some terms of the agreement have been omitted or varied by fraud, mistake, or surprize, and that the agreement is different from what the parties intended; and whether, on such a case being distinctly proved, the plaintiff can obtain a decree for a specific performance of the agreement in its rectified form, is a much larger and more difficult question, and one on which it is not easy to reconcile all the authorities. In the cases of Lord Irnham v. Child (3), and Lord Portmore v. Morris (4),

(1) Legal v. Miller, 2 Ves. 299., cited 6 Ves. jun. 336. n.; and 17 Ves. jun. 364.

(2) 17 Ves. jun. 364., and see Omerod v. Hardman, 5 Ves. jun. 722.

(3) 1 Bro. Ch. C. 91.

(4) 2 Bro. Ch. C. 219.

 where

where the plaintiff filed a bill to redeem an annuity, and the question was, whether parol evidence could be admitted to shew, that the parties intended the annuity to be redeemable, but did not insert in the deed a clause to that effect, supposing it would make the transaction usurious *; Lord Thurlow in the one case, and Lord Kenyon in the other, thought it clear, that if the clause had been omitted by *fraud*, or if the agreement had been varied by fraud, the evidence would be admissible. Lord Thurlow, in the former case, after saying, that the rule of evidence is not subverted, if there is clear proof of *fraud*, added, " then as to *mistake* or *accident*, suppose it were a clear thing, that one agreement was intended, and that by accident it was extended further; but there is no such case in the books; if *admitted* to be a mistake, the Court would not overturn the rule of equity by varying the deed, but it would be an equity dehors the deed. Then it should be proved as much to the satisfaction of the Court, as if it were admitted." In another part of his judgment Lord Thurlow says, " It is necessary to see the statement of the bill; if it states, that it was agreed, that the clause for redemption should not be inserted, they cannot read the evidence; but if it is stated, that it was intended to insert the clause, but that it was suppressed by *fraud*, I cannot refuse to hear evidence read to establish the rule of equity. They are at liberty to read evidence to prove such *fraud*, as will make a ground in equity."

* Lord Eldon has observed (*a*) on these cases, that they proceed on an indisputably clear principle, that the parties did not mean to insert in the agreement a provision for redemption, because they agreed that it would be usurious; and they desired the Court to do not what they intended, *for* the insertion of that provision was directly contrary to that intention; but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention. The answer is, they admit it was not to be in the deed; and why was the Court to insert it, where two risks had occurred to the parties? the danger of usury, and the danger of trusting to the honour of the party.

(*a*) 6 Ves. jun. 332.

This

This doctrine respecting the propriety of receiving parol evidence on the part of the *plaintiff* under circumstances of clear *fraud*, appears to have been admitted in other modern cases (1). The difficulty has generally been in carrying the principle into practice, and in ascertaining what constitutes a fraud. In the case of Pember v. Mathers (2), Lord Thurlow allowed the plaintiff, on a bill for specific performance, to give parol evidence of a promise by the defendant under the following circumstances. The bill was filed by the original lessees of a leasehold estate, against an assignee of the lease, on his parol undertaking to indemnify the plaintiff against all rents and covenants to be paid or kept on the part of the lessee, and to execute a bond for such an indemnity. The assignment had been made by a sale by auction; and the conditions of sale did not stipulate the indemnity; but it rested only on parol evidence. This evidence was objected to as inadmissible, on the ground, that, where the parties have entered into a written agreement, no parol evidence could be admitted to increase or diminish such agreement. Lord Thurlow said, "the rule is right; but where the objection (to the omission of an article) was formally made, and promised by the other party to be rectified, it comes among the string of cases, where it is considered as a fraud upon the rule of law." As some doubt arose, whether the evidence was sufficient to establish the parol undertaking to indemnify, entered into by the defendants, Lord Thurlow directed an issue to be tried, whether such promise was made on the day of the execution of the assignment; and, this being found in the affirmative, the plaintiff had a decree for a specific performance. In speaking, however, of the case of Pember v. Mathers, the present Master of the Rolls appears to have entertained some doubt, how far it would be proper to go the whole length of the doctrine there laid down, or

(1) See Marquis of Townsend v. Stangroom, 6 Ves. jun. 338.

(2) 1 Bro. Ch. C. 51.

to decree a specific performance, on the ground of such a promise. (1)

It does not appear from any reported case, that the *plaintiff* has been allowed to give parol evidence, varying a written agreement, on the ground of *mistake* or *surprise*. In the case of Joynes v. Statham (2), indeed, where, on a bill for the specific performance of an agreement for the lease of a house at a certain rent, the *defendant* was admitted to prove by parol evidence, that the agreement was for rent clear of all taxes, Lord Chancellor Hardwicke, after observing, that "the *defendant* had a right to insist, *either on account of an omission, mistake, or fraud*, that the plaintiff should not have a specific performance," is reported to have added, "Suppose the defendant had been the plaintiff, and had brought a bill for a specific performance of the agreement, I do not see but that he might have been allowed the benefit of disclosing this to the Court; because it was an agreement executory only, and as in leases there are always covenants relating to taxes, the master will inquire, what the agreement was as to taxes; and therefore the proof offered here is not a variation of the agreement, but is explanatory only of what those taxes were." Lord Redesdale in a very late case (3), commenting on this passage, observed, "that the words do not appear to import any thing positive;" and with respect to the case, which, Lord Hardwicke conceived, might possibly be made, where even a plaintiff might be admitted to shew an omission in a written instrument as well on the ground of mistake as of fraud *, added, that he could find no decision, except the contrary way.

In

(1) See 14 Ves. jun. 524.
(2) 3 Atk. 388.
(3) Clinan v. Cooke, 1 Schoal. & Lef. 39. See also 4 Bro. Ch. C. 518. 6 Ves. jun. 335. n.; and 7 Ves. jun. 220.

* The words of Lord Redesdale, in the report, are as follow: "There seems to have been something of a floating idea in the mind of Lord Hardwicke, that

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In the case of the Marquis of Townshend v. Stangroom (1), Lord Eldon, after observing "that it was competent to a court of equity, (for the purpose of enabling it to determine, whether it will specifically execute an agreement,) to receive evidence of the circumstances, under which it was obtained," added, "and I will not say, that there are no cases, in which it may be received to enable the court *to rectify a written agreement upon surprise or mistake, as well as fraud;* proper irrefragable evidence, as clearly satisfactory, that there has been mistake or surprise, as, in the other case, that there has been fraud. I agree that those producing evidence of mistake or surprise, either to rectify an agreement, or calling upon the court to refuse a specific performance, undertake a case of great difficulty; but it does not follow, that it is therefore incompetent to prove the actual existence of it by evidence." A specific performance was in this case sought, with a variation attempted to be introduced by parol. And Lord Eldon stated, "he would not say, that, upon the evidence without the answer, he should not have had so much doubt, whether he ought not to rectify the agreement, as to take more time to consider, whether the bill should be dismissed; but the evidence must be taken, due regard being had to the answer (2); and the Court is not to decide upon the allegation as to the probability, against the answer." The bill was accordingly dismissed, but without costs.

The later case of Woollam v. Hearn (3), determined by the Master of the Rolls on great consideration, sets the doctrine of the courts of equity on this subject in a very

(1) 6 Ves. jun. 338.
(2) And see 1 Bro. Ch. C. 92. 3 Bro. Ch. C. 168. 1 Ves. jun. 241.
(3) 7 Ves. jun. 211.

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by possibility a case might be made, in which even a plaintiff might be admitted to shew an omission, *either by mistake or fraud.* However I can find no decision except the contrary way."

 distinct

distinct and clear point of view. The plaintiff there filed a bill for the specific performance of an agreement for a lease; and the bill stated, that the rent of 73l. 10s., specified in the agreement, was inserted by mistake, or with some unfair view; the real agreement being, that the plaintiff was to have the lease upon the same rent, as the defendant paid to his lessor, and that he the defendant did not pay more than 60l. The defendant in his answer admitted, he might have said, that the plaintiff should have the lease upon the same terms, not meaning the same rent, but upon terms on the whole equally advantageous; insisting, that as he had laid out a great deal of money, the plaintiff would upon the whole have as good a bargain. The plaintiff offered parol evidence to prove, that he was to have it on the same terms as the defendant had it, and to shew, that nothing could be meant by the expression, but the same rent; nothing being in discussion between them, but the amount of the rent. The question was, whether this evidence was admissible. The Master of the Rolls, in giving judgment, said, that "by the rule of law, independent of the statute of frauds, parol evidence could not be received to contradict a written agreement. To admit it for the purpose of proving, that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry, that the rule of law was adopted. Though the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any that parol can supply. If this had been a bill brought by the *defendant* for a specific performance," added the Master of the Rolls, "I should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining a decree; first, to falsify the written agreement, and then to substitute in its place a parol agreement to be executed by the court. Thinking as I do, that the statute has been

already

already too much broken in upon by supposed equitable exceptions, I shall not go farther in receiving and giving effect to parol evidence, than I am forced by precedent. There is no case, in which the court has gone the length now desired. But two cases (1) are produced, in which, it is said, there is an intimation from Lord Hardwicke to that effect. Upon this, it might be sufficient to say, it was not decided. But it is evident from the manner, in which that great Judge qualifies his own doubts, that he thought it impossible to maintain such a proposition, as the plaintiff is driven to maintain. In Walker v. Walker it is to be observed, first, that the parol evidence was not offered for the purpose of contradicting any thing in the written agreement. It was admitted, that, as far as it went, it stated the true meaning; but it was contended by the defendant, that there was another collateral agreement, which the plaintiff ought to execute, before he could have the benefit of the written agreement; it was evidence, too, offered in defence, to resist a decree. The evidence offered in this case," added the Master of the Rolls, concluding his judgment, "is to vary an agreement in a material part; and having varied it, to procure it to be executed in another form. There is nothing to shew, that this ought to be done." The proposed evidence was accordingly rejected; and the bill dismissed, without costs.

Where a written agreement has been varied by parol, and there has been such a part-performance of the parol variation, as would have procured it to be specifically executed, provided it had formed a part of the original agreement, the plaintiff in that case will be admitted to give evidence of such subsequent unwritten variation. As to what constitutes a part-performance, Lord Redesdale, in a very late case (2), has laid down the following rule, that

(1) Walker v. Walker, 2 Atk. 98. Joynes v. Statham, 3 Atk. 388.

(2) Clinan v. Cooke, 1 Schoal. & Lef. 41. 14 Ves. jun. 388.

"nothing

"nothing is to be considered as a part-performance, which does not put the party into a situation, that is a fraud upon him, unless the agreement is performed; for instance, if upon a parol agreement, a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreement. This is put strongly in the case of Foxcraft v. Lister (1); there, the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong-doer, and to account for the rents and profits, because he entered in pursuance of an agreement. Then, for the purpose of defending himself against a charge, which might otherwise be made against him, such evidence was admissible; and if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That," said Lord Redesdale, "I apprehend to be the ground, on which courts of equity have proceeded, in permitting part-performance of an agreement to be a ground for avoiding the statute; and I take it, therefore, that nothing is to be considered as part-performance, which is not of that nature. Payment of money is not part-performance, for it may be repaid; and then the parties will be just as they were before, especially if repaid with interest. But the great reason, why part-payment does not take such an agreement out of the statute, is, that the statute has said, that in another case, namely, with respect to goods, it shall operate as a part-performance; and the courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant it should not bind in the case of lands."

3. Mistakes and misapprehensions in the drawers of deeds or written agreements are a subject for relief in courts of equity, and may be rectified according to the

(1) 2 Vern. 456.

true

true intention of the parties (1). Thus, on a bill to rectify a mistake in a policy of insurance, which the plaintiff suggested to have been made too general and contrary to the intention of the parties, Lord Hardwicke said (2), there could be no doubt, but that the Court of Chancery had jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against fraud in contracts; so that if reduced into writing, contrary to the intention of the parties, *on proper proof* that would be rectified. "This," as Lord Eldon has observed (3), "is loose in one sense, as it leaves to every judge to say, whether the proof is that proper proof, which ought to satisfy him." The principal evidence on the part of the plaintiff, in this case, was the deposition of a witness, who had transacted the business for the Company (the defendants), but this evidence appeared to the Court not sufficiently certain to be relied upon. Lord Hardwicke observed, that the proof in such a case ought to be the strongest possible; and as it did not sufficiently appear to the Court, that the policy had been framed contrary to the intention and real agreement of the parties, the bill was dismissed. In the case of Baker v. Paine, on a bill filed for an account under a written agreement, the minutes and calculations, which had been previously made by the parties, were admitted in evidence, in order to prove a mistake made in the agreement by the person employed to draw it (4). And in a variety of cases where settlements have been drawn by mistake, contrary to the instruction of the parties, the mistake has been rectified by courts of equity, and the settlement made conformably to the instructions (5). The Court, however, will expect full and satisfactory evidence of the mistake and misapprehension of the party's intention, be-

(1) 2 Atk. 203.

(2) Henkle v. Roy. Ex. Assur. Comp. 1 Ves. 318., cited 6 Ves. jun 333. See also Motteux v. Lond. Assur. Comp. 1 Atk. 545. Thomas v. Fraser, 3 Ves. jun. 399. 10 Ves. jun. 227.

(3) 6 Ves. jun. 333.

(4) Baker v. Paine, 1 Ves. 457., cited in Rich v. Jackson, 6 Ves. jun. 336. n.

(5) Randal v. Randal, 2 P. Wms. 469. Jenkins v. Quinchant, 5 Ves. jun. 596. n. Barstow v. Kilvington, 5 Ves. jun. 593. Burt v. Barlow, 3 Bro. Ch. C. 451.

fore

fore it will alter a settlement. In one case, where the parol evidence of the attorney, who had received verbal instructions, was offered, the Court held, that as nothing appeared in writing under the hands of the parties to shew their intention, the settlement could not be altered (1); and in another case, Sir Thomas Clarke is reported to have said, that he did not give a positive opinion as to the head of mistake, but he did not think the Court had relied on parol evidence only. (2)

4. Provisions in wills have in certain cases been enlarged by parol evidence, and trusts in equity raised, as against executors or other persons claiming an interest under wills, where it has appeared that the testator intended to make a further provision in his will, but omitted to insert it on receiving a promise, that, notwithstanding such omission, his intention should be carried into effect. Thus, in the case of Oldham v. Litchford (3), a witness was allowed to prove, that the defendant, who was the testator's executor and devisee of his real estate, had promised the testator, that he would pay the annuity bequeathed to the plaintiff, and that otherwise the testator would have charged the real estate with the payment. And on this evidence, it was decreed at the Rolls, that the real estate should be charged with the annuity: and this decree was afterwards affirmed on appeal to the Court of Chancery. In a later case (4), where a bill was filed against an executor and residuary legatee, to have a bequest enlarged, it appeared from a paper written by the defendant himself, that the testator, a few days before his death, had mentioned to him what he had bequeathed to the plaintiff, and that it was his wish that he should have a larger sum; it was further proved, that after the testator's death, when the paper was shewn to the defendant,

(1) Harwood v. Wallis, cited 2 Ves. 195.

(2) 1 Dick. 295. And see Shergold v. Boone, 13 Ves. jun. 373, 6.

(3) 2 Vern. 506.

(4) Barrow v. Greenough, 3 Ves. jun. 152.

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he promised to perform the same according to the testator's request; another witness proved, that the testator mentioned to him, in the presence of the defendant, the annuity which he had bequeathed to the plaintiff, and that it was his desire he should have a larger annuity, mentioning the sum; that the testator then requested the defendant to see such annuity paid to the plaintiff, and the defendant promised it should be done, as if it had been expressed in the will; and lastly, that the witness and the defendant desired the testator to send for some person to draw a new will, which the testator refused to do, saying he would leave it to the defendant's generosity. "Upon this evidence," said the Master of the Rolls, "the question is, whether, by reposing that trust in the defendant, the testator was not prevented from making a new will. The defendant ought to have told him, that if he did not put it in his will, he would not do it. Instead of that, he promised to do it; upon which the testator refused to make a new will. I am quite relieved," added the Master of the Rolls, "from any difficulty as to the statute of frauds. The question is, whether the confidence, that the defendant would perform the trust he undertook, did not prevent the testator from making a new will." The Court accordingly ordered the defendant to pay the increased sum out of the assets, with costs; and, if the assets were not sufficient for the costs, that he should pay them personally.

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